The Uncertain *Miranda Fuel* Doctrine

LEE M. MODJESKA*

The National Labor Relations Board (NLRB) held in the recent trilogy of *Handy Andy, Inc.*,[1] *Bell & Howell Co.*,[2] and *Murcel Manufacturing Corp.*,[3] that the Constitution did not require and the National Labor Relations Act (NLRA)[4] did not permit the Board to withhold certifications or bargaining orders from unions that practice racial or other invidious discrimination.[5] Instead, the Board announced that issues involving alleged invidious discrimination by unions are to be resolved in unfair labor practice proceedings under the Board's *Miranda Fuel Co.* doctrine of the duty of fair representation.[6] The Board stated in *Handy Andy* that "[t]he duty of fair representation has become the touchstone of the Board's concern with invidious discrimination by unions."[7] It is now fifteen years since the Board announced the "novel, if not quite revolutionary theory"[8] that the breach by a union of the duty of fair representation is an unfair labor practice under section 8 of the NLRA.[9] By a steady expansion of the *Miranda Fuel* doctrine since that time, the Board has embarked upon a course of ever-increasing review and regulation of areas of union conduct previously free from Board involvement.

The Board's doctrine was rejected by the Second Circuit in *Miranda Fuel* enforcement proceedings. Indeed, it has been specifically endorsed by only a few courts and endorsed without critical analysis by only a few others, and has not yet received approval from the Supreme Court. It has, moreover, been the subject of numerous

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* Associate Professor of Law, The Ohio State University College of Law. The author is a former Assistant General Counsel of the National Labor Relations Board, where he served in the Supreme Court, Appellate Court, and Advice Branches.

1. 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354 (1977).

2. 230 N.L.R.B. No. 57, 95 L.R.R.M. 1333 (1977).

3. 231 N.L.R.B. No. 80, [1977-78] LAB. L. REP. (CCH) ¶ 18,493 (NLRB 1977). *See also* Plumbers Local 393, 232 N.L.R.B. No. 83 (1977) (concerning a § 10(k) jurisdictional dispute work award).

4. 29 U.S.C. §§ 141-144, 151-168, 171-182, 185-187 (1970 & Supp. V 1975).

5. In so holding, the Board overruled its holding in Bekins Moving & Storage Co., 211 N.L.R.B. 138 (1974), that it lacked the constitutional power to confer certification on a union engaging in discriminatory practices. *See* NLRB v. Mansion House Corp., 473 F.2d 471 (8th Cir. 1973), in which the court held that the Board was precluded by the fifth amendment from issuing a bargaining order in favor of a union that practices racial discrimination; Modjeska, *The NLRB 1977: Significant Decisions of the Board and General Counsel*, 103 MIDWEST LAB. L. CONF. 2.01, 2.01-2.05 (Ohio Legal Center Institute 1977).

6. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

7. 228 N.L.R.B. No. 59, 94 L.R.R.M. at 1362.

8. NLRB v. Miranda Fuel Co., 326 F.2d 172, 177 (2d Cir. 1963).

9. 29 U.S.C. § 158 (1970).

split Board decisions. The new chairman of the Board, Chairman Fanning, dissented in *Miranda Fuel* and has consistently expressed his disagreement with the doctrine.[10] With this background, and in light of the vigorous reaffirmation given *Miranda Fuel* by the Board in *Handy Andy*, *Bell & Howell*, and *Murcel* it seems appropriate at this point to re-examine the theoretical underpinnings of the doctrine and review the course that the Board has taken.[11] This article summarizes the judicial background of the fair representation doctrine prior to *Miranda Fuel*, analyzes the *Miranda Fuel* decision itself, summarizes the more significant applications of the doctrine by the Board, and examines the statutory bases for the doctrine as defined and applied by the Board and as interpreted by the Supreme Court. The unavoidable conclusion emerging from this analysis is that the Board lacks an appropriate congressional charter for the course it has taken. This course also appears to be inconsistent with the Supreme Court's interpretation of the unfair labor practice provisions upon which the doctrine is based. Thus, the doctrine rests upon the most uncertain of foundations.

I. THE *Miranda Fuel* DOCTRINE

The doctrine attributed to *Miranda Fuel* is that breach of a union's duty of fair representation is an unfair labor practice. The Board seems to feel that such a breach occurs, stated simply, when the union treats an employee unfairly. An analysis of the underlying statutory framework and the doctrine's emergence as a major principle of labor law will be examined in the following sections.

A. *The Statutory Framework*

The NLRB performs two functions under the NLRA.[12] Under section 10 of the Act, the Board decides whether or not particular conduct violates the unfair labor practice prohibitions of section 8. In addition to its adjudicative powers, the Board enforces these prohibitions by conducting administrative hearings and issuing decisions and orders, either dismissing complaints or requiring a party to cease and desist from the unfair labor practice found. The Board

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10. *See, e.g.*, note 134 *infra*.

11. The focus of this article is upon Board doctrine under *Miranda Fuel*. For a review of the general development of the duty of fair representation before the courts, see Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEXAS L. REV. 1119 (1973); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Summers, *The Individual Employee's Right Under the Collective Agreement: What Constitutes Fair Representation*, 126 U. PA. L. REV. 251 (1977).

12. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 24 (1937).

is also empowered to issue orders requiring the parties to take such affirmative action as will effectuate the policies of the Act.[13]

Under section 9 of the Act, the Board administers the representation determination procedures.[14] Section 9(a) provides that a representative selected by the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all unit employees.[15] "Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule."[16] The grant of exclusive representative status places "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers . . . ."[17] As stated by the Supreme Court in *NLRB v. Allis-Chalmers Manufacturing Co.*:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. . . . Thus only the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term, and his right to refuse to cross a lawful picket line. The employee may disagree with many of the union decisions but is bound by them.[18]

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13. *See* Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261, 264-69 (1940).

14. AFL v. NLRB, 308 U.S. 401, 405-06 (1940).

15. Section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1970), provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

For an elaboration by the Supreme Court on the majority rule principle embodied in this section, see NLRB v. A.J. Tower Co., 329 U.S. 324, 330-31 (1946).

16. Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975). The Court there held, relying heavily upon the principle of the exclusivity of the bargaining representative, that minority employee protests against an employer's allegedly discriminatory practices were not necessarily protected by § 7 of the NLRA, 29 U.S.C. § 157 (1970), even if the activity was arguably protected by Title VII. The Court also dealt with the congressional allocation of different functions between the NLRB and the Equal Employment Opportunity Commission. *See generally* Lopatka, *Protection Under the National Labor Relations Act and Title VII for Employees Who Protest Discrimination in Private Employment*, 50 N.Y.U.L. REV. 1179 (1975).

17. Brooks v. NLRB, 348 U.S. 96, 103 (1954). *See* International Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961).

18. 388 U.S. 175, 180 (1967). *See* Emporium Capwell Co. v. Western Addition Com-

Thus, section 9 serves the underlying policy of the Act to foster collective bargaining by vesting in the chosen bargaining representative the powerful right of exclusivity within a given bargaining unit. That this right carries with it a correlative duty to fairly represent all employees within that unit was recognized early in the history of the Act.

B. *The Case Law Background*

This duty of fair representation was initially developed by the Supreme Court in a series of racial discrimination cases arising under the Railway Labor Act (RLA).[19] In the first of these cases, *Steele v. Louisville & Nashville Railroad*,[20] the union was the exclusive bargaining representative of a craft unit of firemen. A black minority within the unit was excluded from membership. They were given neither notice nor opportunity to be heard concerning agreements negotiated by the union and the employer that substantially controlled the seniority rights of blacks and restricted their employment opportunities.[21] The Court held that the black firemen could maintain an action grounded in federal law[22] against the union for breach of the statutory duty to represent and act for all members of the craft, as well as an action against the employer who purported to act upon the basis of a proscribed agreement.

The Court noted that under the RLA employees have the right to bargain through representatives of their choosing; that the majority have the right to determine the representative; that the representative bargains for working conditions applicable to the entire class of employees; and that a representative was defined in part as any union designated by the employees to act for them. In the Court's view, this use of the term "representative" in the statute implied that the representative must act on behalf of all the employees it represents. It further noted that the Act imposes a duty upon the employer to bargain exclusively with the majority representative, and that the minority members are thus barred by the statute from choosing their own representative or from bargaining individually with the employer.

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munity Org., 420 U.S. 50 (1975). *See also* Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731 (1950).

19. 45 U.S.C. §§ 151-63 (1970). *See generally* R. GORMAN, LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 695-98 (1976).

20. 323 U.S. 192 (1944).

21. At the outset of negotiations, the union advised the employer of the union's desire to amend the contract so as ultimately to exclude all black firemen from service. *Id.* at 195.

22. *Steele* arose in a state court. Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944), a companion case to *Steele*, held that the duty of fair representation imposed by the RLA was a federal right arising under a law regulating commerce and was thus within the jurisdiction of the federal courts. The Court stated that the duty "is a federal right implied from the statute and the policy which it has adopted" and that it is "[t]he federal statute which condemns as unlawful the [union's] conduct." *Id.* at 213.

Mr. Chief Justice Stone, writing for the Court, concluded that "[t]he fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents."[23] The bargaining representative's duty of equal representation was seen as at least as exacting as that imposed upon the legislature by the equal protection clause of the Constitution.[24]

The *Steele* Court further stated that the Act imposes upon a bargaining representative "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination."[25] While noting that a representative is not barred from making contracts that might have unfavorable effects on some of the unit employees, and that variations based on "relevant" differences (*e.g.*, seniority, skill, type of work) are permissible, it held that "discriminations" among unit members based upon race were not relevant.

> Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations.[26]

Brotherhood of Railroad Trainmen v. Howard[27] extended the RLA duty of fair representation beyond minority members of the particular craft represented by the union. The union, exclusive representative of white "brakemen," forced the employer to agree to discharge black "train porters" who performed the same duties as white "brakemen" but who had been treated by the employer and the union as a separate class for representation purposes, and who had been represented by another union. The Court held that the union's racial discrimination against noncraft members was nevertheless proscribed

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23. 323 U.S. at 202. The Court held that appropriate remedial relief for breach of the duty includes injunction and damages. *Id.* at 207. Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1959), thereafter made clear that injunctive relief for breach of the duty of fair representation was not barred by the anti-injunction prohibitions of the Norris-LaGuardia Act (29 U.S.C. §§ 101-115 (1970)). *Graham* also reaffirmed the illegality of union action based upon racial considerations.

24. The Court reasoned that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . but it has also imposed on the representative a corresponding duty." 323 U.S. at 202.

25. *Id.* at 203.

26. *Id.*

27. 343 U.S. 768 (1952).

by the statutory duty. It found that the end result of the transactions involved was that the black train porters were threatened with loss of their jobs solely on grounds of race, that as in *Steele* discriminations based on race were irrelevant and invidious and unauthorized by Congress, and that "[t]he Federal Act thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers. And courts can protect those threatened by such an unlawful use of power granted by a federal act."[28]

In *Conley v. Gibson*,[29] the Court made clear that the bargaining representative's duty of fair representation under the RLA is not confined to contract negotiations but extends as well to the daily administration of the contract, including the processing of grievances. Holding that the union could not refuse to bargain or process grievances for employees upon the basis of race, the Court stated:

> The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit.[30]

The Supreme Court explained that the duty of fair representation applied equally to the NLRA in the case of *Ford Motor Co. v. Huffman*.[31] There, the union and the employer negotiated an agreement

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28. *Id.* at 774.

29. 355 U.S. 41 (1957).

30. *Id.* at 46.

31. 345 U.S. 330 (1953). In the earlier case of Wallace Corp. v. NLRB, 323 U.S. 248 (1944), involving an employer's violation of § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3) (1970), by utilizing a closed shop agreement to discriminate against members of the incumbent union's rival union, the Court had stated:

> The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation. No employee can be deprived of his employment because of his prior affiliation with any particular union. . . . Numerous decisions of this Court dealing with the Act have established beyond doubt that workers shall not be discriminatorily discharged because of their affiliation with a union. We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving

which gave pre-employment seniority credit for military service, a benefit in excess of the selective service law requirement that employees be given seniority credit for military service occurring subsequent to their employment. The plaintiff, representing a class of veteran and nonveteran employees whose seniority ran from the dates of their employment, claimed that but for the superseniority granted by the negotiated provisions, he and others would not have been laid off or furloughed. Plaintiff contended that by negotiating these provisions, the union exceeded its authority under the NLRA. The Supreme Court held generally that the duty of fair representation was applicable to unions covered by the NLRA, and noted particularly that the Act reflected Congress' faith in free collective bargaining conducted by a freely and fairly chosen representative.[32] The Court stated further that in *Steele* it had been recognized that the authority of the bargaining representative is not absolute, and that "[t]heir statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any."[33] The duty does not preclude the representative from negotiating agreements that prefer one group over another as long as the differences are predicated upon "reasonable grounds of relevancy." The Court stated:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
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> Compromises on a temporary basis, with a view to long-range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs, and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable . . . may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary.[34]

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them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers.

323 U.S. at 255-56.

32. 345 U.S. at 337.

33. *Id.*

34. *Id.* at 338-39. The Court also noted that the NLRA does not require a bargaining

Finding that the pre-employment service credit was consistent with both public policy and fairness as embodied in federal selective service and veteran preference laws, and thus "within reasonable bounds of relevancy,"[35] the Court concluded that the union had the authority to accept the negotiated provisions.[36]

The principle that the duly certified collective bargaining representative has a duty to provide equal representation to all employees in the unit regardless of race, creed, color, or national origin was early applied by the Board in two areas. Thus, the Board indicated that it would consider rescinding the certification of a union that denied equal representation on such grounds.[37] The Board also ruled that collective bargaining contracts that discriminate along racial lines will not bar a representation election.[38]

This then represented the evolution and development of the duty of fair representation prior to *Miranda Fuel.* Under the NLRA, the union, as exclusive bargaining representative, had a statutory duty to represent all employees in the bargaining unit fairly, both in collective bargaining with the employer and in its enforcement of the collective bargaining agreement. A union breached that duty when it acted against a unit employee for arbitrary or discriminatory reasons, or in bad faith. Suits by an employee against a union for breach of the duty were cognizable by federal and state courts with remedies including damages and injunction. Limited relief was also potentially available before the Board to the extent it undertook to police its certifications as part of its section 9 representation authority. Against this background a truckdriver for the Miranda Fuel Company in New York asked for a simple leave of absence, never dreaming that this request would be the first in a chain of events culminating in a Board doctrine of broad application and limited justification.

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representative to base seniority solely upon employment services. *See* Aeronautical Lodge v. Campbell, 337 U.S. 521 (1949).

35. 345 U.S. at 342.

36. An attempt by a few courts to hold the duty of fair representation under the NLRA inapplicable where all employees were members of the union was short-lived. Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955), *rev'g per curiam*, 223 F.2d 739 (5th Cir. 1955). *See also* Williams v. Yellow Cab Co., 200 F.2d 302 (3d Cir. 1952), *cert. denied*, 346 U.S. 840 (1953), relied upon by the Fifth Circuit in *Syres.* The Third and Fifth Circuits were of the view that because all of the employees were union members, the union's authority derived from the members' voluntary consent and not from § 9(a) of the NLRA.

37. *E.g.*, Pioneer Bus Co., 140 N.L.R.B. 54, 55 (1962); Hughes Tool Co., 104 N.L.R.B. 318, 319-24 (1953); Atlanta Oak Flooring Co., 62 N.L.R.B. 973, 975-76 (1945); Carter Mfg. Co., 59 N.L.R.B. 804, 806 (1944). For later application of the doctrine resulting in revocation of a certification for racial discrimination, see Teamsters Local 671 (Airborne Freight Corp.), 199 N.L.R.B. 994 (1972); Metal Workers Local 1 (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964).

38. Pioneer Bus Co., 140 N.L.R.B. 54 (1962). Under the Board's contract-bar doctrine, a valid written collective bargaining agreement, properly executed and binding on the parties, and for a definite term, will generally bar an election for the contract term up to three years. General Cable Corp., 139 N.L.R.B. 1123 (1962); Appalachian Shale Prods. Co., 121 N.L.R.B.

C. *The* Miranda Fuel *Decisions*[39]

The *Miranda Fuel* case progressed through a number of stages before giving rise to the doctrine for which it is well known. A knowledge of this background is essential to an understanding of the reasoning ultimately resorted to by the Board.

1. *Miranda Fuel I*

In *Miranda Fuel*, the employer and the union were parties to a collective bargaining agreement covering a unit of truckdrivers in New York. In April 1957, one of the drivers, Lopuch, requested and received permission from the employer to take a leave of absence for personal business in Cleveland, Ohio. Section 8 of the labor contract authorized personal leave during the slack season from April 15 to October 15 for any employee who would not, "according to seniority," have steady employment during that period.[40] On October 10, Lopuch telephoned the employer from Cleveland and said he would be back to work by October 15. On October 14, Lopuch became ill and did not recover until October 28. He advised the employer of his illness and of his intention to return to work when he recovered. Upon his return on October 30, Lopuch was initially retained in his regular

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1160 (1958); Deluxe Metal Furniture Co., 121 N.L.R.B. 995 (1958). In *Pioneer Bus*, the Board stated:

> Consistent with clear court decisions in other contexts which condemn governmental sanctioning of racially separate groupings as inherently discriminatory, the Board will not permit its contract-bar rules to be utilized to shield contracts such as those here involved from the challenge of otherwise appropriate election petitions. We therefore hold that, where the bargaining representative of employees in an appropriate unit executes separate contracts, or even a single contract, discriminating between Negro and white employees on racial lines, the Board will not deem such contracts as a bar to an election.

140 N.L.R.B. at 55.

39. 125 N.L.R.B. 454 (1959), *enforced*, 284 F.2d 861 (2d Cir. 1960), *vacated and remanded per curiam sub nom.* Local 553, Int'l Bhd. of Teamsters v. NLRB, 366 U.S. 763 (1961), *dec. on remand*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). For early commentary on the *Miranda* decisions, see Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 MO. L. REV. 373 (1965); Sherman, *Union's Duty of Fair Representation and the Civil Rights Act of 1964*, 49 MINN. L. REV. 771 (1965).

40. Section 8 of the contract provided in relevant part:

> Section 8. It is agreed by both parties that depot seniority shall prevail. . . .
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> . . . .
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> It is further understood and agreed that during the dull season of the year, preference shall be given to the fuel oil chauffeurs on the seniority list, and that the Shop Steward shall be the No. 1 fuel chaffeur on the list.
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> During the slack season, April 15 to October 15, any employee who according to seniority would not have steady employment shall be entitled to a leave of absence and maintain his full seniority rights during that period. Any man so described must report to the Shop Steward not later than 8 A.M. on October 15 and sign the seniority roster in order to protect his seniority, and the Employer agrees to accept the certification of said Shop Steward as to availability of such men when called by the Employer. If October 15 falls on a Saturday or Sunday, the reporting day shall be the next work day. Any man failing to report as above specified shall forfeit seniority rights.

125 N.L.R.B. at 463.

seniority rank as 11th of 21 drivers. The union's first demand, that Lopuch be placed at the bottom of the seniority list because of his failure to report to the shop steward on October 15 as required by Section 8 of the contract, was abandoned after a physician in Cleveland verified Lopuch's illness. The union then asserted that Lopuch must nevertheless be placed at the bottom of the seniority list because he had gone on leave prior to the April 15 date referred to in Section 8 of the contract as the start of the slack season.[41] The employer reluctantly complied with the union's demand because it believed it had no alternative under the contract, despite the fact that it had granted Lopuch permission to take the leave when he did.

In *Miranda Fuel I*, the Board found that Section 8 of the contract by its express terms only applied to employees entitled to a leave during the April 15 to October 15 slack season because according to seniority they would not have steady employment.[42] The record showed that the employer had steady work available for Lopuch during the slack season. Because Lopuch took his leave for personal reasons, not because his seniority would have precluded his having steady employment during the slack season, and was granted his leave prior to April 15, the Board concluded that Section 8 of the contract was inapplicable. The employer's acquiescence in the union's demand, motivated by the employer's practice to allow union determination of matters affecting employee seniority, violated section 8(a)(3) and (1) of the NLRA.[43] The union violated section 8(b)(2) and (b)(1)(A)[44] of the Act by causing the employer to engage in such discrimination.[45]

41. The union's demand for the reduction of Lopuch's seniority was based upon a request by other union members employed by the employer. *Id.* at 464.

42. *Id.* at 457.

43. Section 8(a) of the Act provides in relevant part:

> It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a)(1), (3) (1970).

44. Section 8(b) of the Act provides in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 . . . . (2) to cause or attempt to cause an employer to discriminate against an employee . . . with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

29 U.S.C. § 158(b)(1)(A), (2) (1970).

45. In so holding in *Miranda Fuel I*, the Board, relying upon the doctrine of Pacific Intermountain Express Co., 107 N.L.R.B. 837 (1954), *enforced*, 223 F.2d 170 (8th Cir. 1955), *cert. denied*, 351 U.S. 952 (1956), stated:

> The record in this case discloses, and we find, that the seniority provision in question was not by its terms applicable to Lopuch's situation, and thus the reduction in his seniority, though accomplished under the guise of contractual agreement, was nevertheless not the result of the Union's performance of a purely ministerial act, but in fact

Miranda Fuel I was enforced by the Second Circuit.[46] Upon grant of the union's petition for certiorari and the Board's acquiescence therein, however, the Supreme Court remanded the case to the Board[47] for consideration in view of the Supreme Court's intervening decision in *Local 357, International Brotherhood of Teamsters v. NLRB.*[48] In *Local 357* the Court, rejecting the Board's theory, held that an exclusive hiring hall agreement between an employer and a union was not per se unlawful under section 8(a)(3) and (1) of the Act, and that a union's demand for the discharge of an employee who had been hired without having been referred through the union hiring hall did not violate section 8(b)(2) and (1)(A). The Court held that the mere enforcement of the agreement, without more, was not the kind of discrimination proscribed by the Act. The Court stated that "[i]t is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test."[49] The Court noted that the encouragement of union membership that may occur whenever a union performs its job well is not the discriminatory encouragement proscribed by the Act. Mr. Justice Douglas stated for the Court, "but, as we said in [*Radio Officers' Union v. NLRB*[50]] the only encouragement or discouragement of union membership banned by the Act is that which is 'accomplished by discrimination.' "[51] The Court thus found that the mere delegation to the

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was effectuated through concession by the Company to a position taken by the Union which, although purportedly in reliance on the contractual provision, nevertheless was outside the scope of the parties' agreement and within the field of seniority generally. As the contract clearly did not cover Lopuch's situation, we find that it cannot serve as a defense to the discrimination inherent in the reduction of Lopuch's seniority.

125 N.L.R.B. at 455-56.

46. NLRB v. Miranda Fuel Co., 284 F.2d 861 (2d Cir. 1960). The court found that the contract did not delegate exclusive control over seniority to the union since the contract contained objective criteria for determining seniority. The court did concur in the Board's finding that Lopuch's seniority reduction was not authorized by the contract and represented a delegation of power over seniority from the employer to the union that improperly encouraged union membership and discriminated against Lopuch. The court stressed the importance of the fact that "the action taken was against and not under the agreement . . . ." *Id.* at 863. In the court's view, when a contract contains objective criteria for the determination of seniority, and when application of the provisions involves "merely administrative or ministerial functions" on the part of the union, there is no improper delegation of authority to a union that would encourage union membership or discriminate against employees. *Id.*

47. Local 553, Int'l Bhd. of Teamsters v. NLRB, 366 U.S. 763 (1961).

48. 365 U.S. 667 (1961). *See also* NLRB v. News Syndicate Co., 365 U.S. 695 (1961).

49. 365 U.S. at 675.

50. 347 U.S. 17 (1954).

51. 365 U.S. at 676. The Court further stated:

> It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages union membership whenever it does its job well.

Id. at 675-76. For subsequent development of the discriminatory motivation analysis, see

union of substantial control over and involvement in the hiring process did not violate the Act. This decision indicated that the delegation to the union of control over employee seniority might likewise be considered conduct protected under the NLRA.

2. *Miranda Fuel II*[52]

Upon remand, the Board found that its initial decision could not stand in light of *Local 357* and held that the mere delegation to the union of the authority to determine seniority for employees was not a sufficient predicate on which to find discrimination.[53] The Board did not read *Local 357*, however, to sanction any union action affecting an employee's employment status that was not based upon the employee's union membership or activities. The Board thereupon developed an alternative ground upon which to find the union's conduct unlawful, namely breach of the duty of fair representation as an unfair labor practice. Looking to the doctrine of *Steele v. Louisville & Nashville Railroad*[54] and its progeny, the Board found that the duty of fair representation imposed upon an exclusive bargaining agent under the Act, when viewed in the context of the section 7 right of employees "to bargain collectively through representatives of their own choosing," meant that section 7 of the Act "gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment."[55] Reasoning that "[t]his right of employees is a statutory limitation on statutory bargaining representatives," the Board concluded that "[s]ection 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."[56] The Board noted that while a union, as statutory bargaining representative, has obligations to employees that employers do not, nevertheless employer participation in a union's arbitrary action against an employee violates section 8(a)(1). The Board further concluded that a union violates section 8(b)(2), and an employer violates section 8(a)(3), when a union causes or attempts to cause an employer to derogate the employment status of an employee for arbitrary or irrelevant reasons, or because

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NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

52. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

53. 140 N.L.R.B. at 183.

54. 323 U.S. 192 (1944). *See* notes 20-38 *supra* and accompanying text.

55. 140 N.L.R.B. at 185.

56. *Id.*

of an unfair classification.[57] In this regard the Board did not read *Local 357* as overruling the holding of *Radio Officers* that union membership is encouraged or discouraged when a union causes an employer to affect an employee's employment status. Rather, in the Board's view, *Local 357* held that while a section 8(a)(3) or 8(b)(2) violation may not automatically follow from conduct that has a foreseeable result of encouraging union membership, the existence of a violation may turn upon an evaluation of the legitimacy of the employer or union purposes underlying the conduct.[58]

Applying this set of principles, the Board found that because the union caused Lopuch's seniority reduction in violation of the contract and pursuant to the unjustified pressure of certain union employees, the union had no legitimate union purpose and interfered with Lopuch's right to fair and impartial treatment in derogation of section 8(b)(1)(A). The Board further found that the union caused the employer to discriminate against Lopuch, which had a foreseeable effect of encouraging union membership. Because this discrimination was in violation of the contract and otherwise arbitrary and without legitimate purpose, the union violated sections 8(b)(1)(A) and (2), and the employer violated sections 8(a)(1) and (3).

Chairman McCulloch and Member Fanning dissented. In their view, since there was no showing that union considerations motivated the employer or the union—that is, no proof of unlawful discrimination—there was no violation of section 8(b)(2) or 8(a)(3). They regarded the majority as applying the naked arrogation doctrine rejected by the Supreme Court in *Local 357*. It is difficult to improve upon the dissent's critical analysis of the Board's misapplication of section 8(b)(2) and avoidance of the discriminatory motivation prerequisite. The dissent makes an incisive, devastating legal argument that, until finally answered by the Supreme Court, will necessarily limit the vitality of *Miranda Fuel*.

The dissenters found no basis for the majority's conclusion that a union's breach of its duty of fair representation violates section 8(b)(1)(A), and that an employer's acquiescence therein violates section 8(a)(1). Agreeing with the majority that section 9 of the Act imposes

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57. The Board stated: "This would obtain, for example, where for arbitrary or irrelevant reasons, a statutory bargaining representative attempts to cause an employee's discharge and the employer then becomes party to such violation of Section 7 rights by acceding to the union's efforts." *Id.* at 186.

58. The Board commented:

> Unlike our colleagues, we do not interpret the Court's opinion [in *Local 357*] as permitting unions and their agents an open season to affect an employee's employment status for any reason at all—personal, arbitrary, unfair, capricious, and the like—merely because the moving consideration does not involve the specific union membership or activities of the affected employee.

Id. at 188.

a duty on the statutory bargaining representative to represent all employees in the bargaining unit fairly and impartially, the dissenters disagreed that the unfair labor practice provisions of section 8 provide a remedy. Rather, they considered existing court remedies to be adequate. The dissenters found nothing in the history of the Act, or in Board and court precedent, to support the view that sections 8(b)(1)(A) and 8(a)(1) had the reach given them by the majority. The dissent stated:

> We join our colleagues in their condemnation of arbitrary and invidious action against employees, whether at the hands of their employers or at the hands of their bargaining representatives. We recognize also that their proposal represents a laudable effort to reach—in appropriate cases—union or employer conduct which falls outside the literal scope of the Act's prohibitory unfair labor practice provisions. But to say that a proposal is laudable and that it has a salutary objective does not endow it with legal validity.[59]

Miranda Fuel II was denied enforcement by the Second Circuit.[60] The court found that the "per se theory" developed and applied by the Board in its remand decision was "novel, if not quite revolutionary,"[61] and that sections 8(b)(2) and (1)(A), and 8(a)(3) and (1), are violated only when the union or employer conduct is predicated upon union considerations. The court felt that discrimination based upon reasons unrelated to union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations, are not sufficient to establish violations. Rather, there must be an intent and purpose, or a deliberate design, of encouraging or discouraging union membership. The court concluded that the unfair labor practice machinery of the Board was "not suited to the task of deciding general questions of private wrongs, unrelated to union activities, suffered by employees as a result of tortious conduct by either employers or labor unions."[62]

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59. *Id.* at 202 (Members Fanning and Jenkins dissenting).

60. NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963). Chief Judge Lumbard concurred and Judge Friendly dissented.

61. *Id.* at 177.

62. *Id.* at 180. In his concurring opinion, Chief Judge Lumbard agreed that conduct wholly unrelated to the employee's relationship with the union does not violate §§ 8(a)(3) or 8(b)(2). He stated that he would not reach the question of whether breach of the duty of fair representation might constitute an unfair labor practice because the union did not in fact breach its duty. Chief Judge Lumbard found that:

> The evidence upon which the Board relies is insufficient to support its conclusion that the union took "hostile action, for irrelevant, unfair or invidious reasons" against Lopuch. The Board adduced no evidence to suggest that the union acted, albeit in response to the demands of the other employees, otherwise than in a belief, honestly held, that Lopuch had lost his seniority under the collective bargaining agreement. Such conduct does not constitute a violation of the duty of fair representation implicit in Section 9 of the Act.

Id. at 180.

It is important to note the extent to which the Board's theory and holding in *Miranda Fuel II* rests upon the Board's reaching an interpretation of the contract different from that of the union, and not upon independent evidence of hostile, invidious, bad faith, or anti-union motivation. The contract appeared to require a forfeiture only for failure to return on time from a leave of absence, and the union apparently recognized the inapplicability of this condition once it learned of Lopuch's illness. The union nevertheless construed the contract to prohibit early departure on leave. In the Board's view, this clause of the contract was designed to eliminate seasonal fluctuations in employment and thus to apply only to employees who would not have had steady employment during the slack season. Lopuch was not such an employee and, therefore, Section 8 of the contract did not apply to his leave of absence. Whether the Board's or the union's construction was correct, it seems that sufficient ambiguity concerning the application of Section 8 of the contract existed to preclude finding on that basis alone that the union's position was predicated upon bad faith or irrelevancy.

Stated differently, it does not seem unreasonable for the union (and the employer) to have believed in good faith that a fair interpretation of Section 8 of the contract required a forfeiture of seniority for any employee who took a leave of absence prior to the designated April 15 to October 15 slack period.[63] The Board thus did not evaluate real evidence of union motivation, nor of the union's good faith. Rather, it sat in review of the union's contract interpretation and passed judgment based upon its own views of reasonableness. This is one of the most significant aspects of *Miranda Fuel II*: the Board's interjection of itself by way of section 8 of the NLRA into the labor-management arena as judge of fairness and reasonableness, not of discrimination. This places the Board dangerously close to the role of

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63. The Second Circuit noted that this interpretation of section 8 of the contract "seems to us far from unreasonable, particularly if made by laymen and not by lawyers, taking into consideration the purpose of said Section 8." *Id.* at 175.

The union had contended that section 8 of the contract in fact applied to drivers who went on leave before April 15 even with the employer's permission. The Board found that even assuming *arguendo* the validity of this contention, the union "certainly was charged with an obligation of fair dealing so to have informed the employer and Lopuch, for it was common knowledge that Lopuch intended to take leave during the slack season for personal reasons unrelated to the objectives of the contract." 140 N.L.R.B. at 190. The Board also found that even viewing this interpretation as a demand for contract modification, insistence on retroactive application of the modification to Lopuch breached its duty of fair dealing because "Lopuch had no reason to anticipate any change in his rights under the contract or to believe that, if the contract changed, it would be applied retroactively to deprive him of his seniority standing. The sacrifice of Lopuch to placate the other drivers does not, in our opinion, comport with the requirements of fair dealing." *Id.*

Concerning union action arguably contrary to the contract and/or union constitution and bylaws, see Denver Stereotypers Local 13 (Denver Post, Inc.), 231 N.L.R.B. No. 96, 96 L.R.R.M. 1073 (1977); United Steelworkers (Miami Copper Co.), 190 N.L.R.B. 43 (1971); Ironworkers Local 229, 183 N.L.R.B. 271 (1970).

dispenser of its own particular, frequently changing views of industrial justice.[64]

The Supreme Court appeared to reject the standard applied by the Board in *Miranda Fuel* when it decided *Vaca v. Sipes*.[65] *Vaca* involved an employee's state court suit[66] alleging that the union

64. In this connection, note the admonitions given the Board by the Supreme Court concerning the limitations placed upon the Board in its evaluation of good faith bargaining under §§ 8(a)(5), 8(b)(3), and 8(d) of the Act (29 U.S.C. §§ 158(a)(5), (b)(3), (d)(1970)). In NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952), the Court stated: "[T]he Board may not, either directly or indirectly, . . . sit in judgment upon the substantive terms of collective bargaining agreements." In NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960), the Court stated:

> Since the Board was not viewed by Congress as an agency which should exercise its powers to arbitrate the parties' substantive solutions of the issues in their bargaining, a check on this apprehended trend was provided by writing the good-faith test of bargaining into § 8(d) of the Act.
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> . . . It must be realized that collective bargaining under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one . . . .
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> . . . Our labor policy is not presently erected on a foundation of government control of the results of negotiations.

Id. at 486, 488, 490. And in his dissenting opinion in H.K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970), Mr. Justice Douglas observed:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.

See generally Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807 (1959).

65. 386 U.S. 171 (1967).

66. Sipes v. Vaca, 397 S.W.2d 658 (Mo. 1966), *rev'd*, 386 U.S. 171 (1967). The Supreme Court made clear in *Vaca* that the Board's "tardy assumption of jurisdiction in these cases" did not preempt federal and state court jurisdiction over suits for breach of the duty of fair representation, 386 U.S. at 183, and reaffirmed an employee's right to maintain a § 301 action in federal court against an employer for wrongful discharge in breach of contract even if the challenged employer's conduct is also arguably an unfair labor practice within the Board's jurisdiction. *E.g.*, Smith v. Evening News Ass'n, 371 U.S. 195 (1962). *See* Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964). Section 301(a) of the Act provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185 (1970). *See generally* Feinsinger, *Enforcement of Labor Agreements—A New Era in Collective Bargaining*, 43 VA. L. REV. 1261 (1957). Generally as a precondition to such suit the employee must attempt to exhaust contractual grievance and arbitration procedures. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). The Court also held in *Vaca* that the employee's suit is not barred by the exclusive contractual procedures where the union has breached its duty of fair representation in handling the employee's grievances. Preliminary judicial determination of the question of the union's breach of its duty will, therefore, frequently be required before the § 301 suit against the employer can proceed. *See also* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

Oversimplifying and overgeneralizing, the preemption doctrine provides that in order to

breached its duty of fair representation by refusing to take to arbitration the employee's grievance for wrongful discharge in violation of the labor contract. The union refused to process the grievance to arbitration because in the union's view the medical evidence was insufficient to prove the employee's fitness for work. The Court stressed that there was no evidence that any of the union officers were personally hostile to the employee nor that the union acted other than in good faith. Therefore, the Court held that because the evidence did not show that the union acted arbitrarily or in bad faith, it had not breached its duty.[67] The Court emphasized that an individual employee has no absolute right to have a grievance arbitrated and that breach of the duty of fair representation is not shown simply by proof that the underlying grievance may have been meritorious.

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avoid state and federal conflicts of law, and to further the primary administrative authority of the Board, the states lack jurisdiction when the activity involved is arguably subject to the NLRA. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

> The rationale for pre-emption . . . rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system.

Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 288 (1971). *See* Farmer v. Carpenters Local 25, 97 S. Ct. 1056 (1977); Lodge 76, IAM v. Wisconsin Emp. Rel. Comm'n, 427 U.S. 132 (1976). State jurisdiction and remedies have been permitted in a variety of situations including areas of serious local concern or of only peripheral concern to the NLRA. *E.g.*, Farmer v. Carpenters Local 25, 426 U.S. 903 (1977) (intentional infliction of emotional distress); American Radio Ass'n v. Mobile S.S. Ass'n, 419 U.S. 215 (1974) (picketing of foreign flag vessels); Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966) (libel); UAW v. Russell, 356 U.S. 634 (1958) (violence); IAM v. Gonzalez, 356 U.S. 617 (1958) (wrongful expulsion from union membership); Allen-Bradley Local 1111, Elec. Workers v. Wisconsin Emp. Rel. Bd., 315 U.S. 740 (1942) (mass picketing). *Compare* Hanna Mining Co. v. Marine Eng'r Beneficial Ass'n, 382 U.S. 181 (1965) *with* Beasley v. Food Fair, Inc., 416 U.S. 653 (1974) (supervisors). *See generally* Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435 (1970); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

67. *See* Humphrey v. Moore, 375 U.S. 335 (1964), which arose in the context of an amalgamation of two separate businesses whose employees were represented by the same union. In that case the union was held not to have breached its duty of fair representation by agreeing with the employer to dovetail the seniority lists. The union's action was predicated upon its view that the contract authorized the resolution. The Court found that the union "took its position honestly, in good faith and without hostility or arbitrary discrimination" and that by "choosing to integrate seniority lists based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors." The Court rejected the contention that the union could not fairly represent the antagonistic interests of the two groups of employees, stating:

> But we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

Id. at 349-50.

In deciding *Vaca*, the Supreme Court merely noted, but did not approve or disapprove, the *Miranda Fuel* doctrine.[68] Particularly intriguing, however, is the fact that the standard of liability applied by the state court and rejected by the Supreme Court in *Vaca* appears to be the standard applied by the Board in *Miranda Fuel II*. The question that the state court in *Vaca* regarded as dispositive of the issue of liability was whether the evidence supported the employee's assertion that he had been wrongfully discharged by the employer, irrespective of the union's good faith in taking a different view.[69] The Supreme Court found that this standard was inconsistent with governing principles of federal law regarding a union's duty of fair representation, and that the plaintiff had failed to prove a breach of that duty. The Court made clear that the standard of liability was a much stricter one, namely, whether or not the union acted arbitrarily, discriminatorily or in bad faith. The Court stated:

> [I]f a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial.[70]

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68. The Court referred to *Miranda Fuel* in the context of the preemption doctrine stating that a principal basis for preemption, the need to entrust primary administrative authority to the Board in order to avoid conflicting rules of law between court and Board, was not present because in the Court's view the Board was simply adopting the fair representation doctrine as it had been judicially developed. Thus, the Court found that "when the Board declared in *Miranda Fuel* that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts." 386 U.S. at 181. *See also* Humphrey v. Moore, 375 U.S. 335 (1964), in which the Court stated:

> Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, . . . subject, of course, to the applicable federal law.

Id. at 344. In Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 71-72 n.25 (1975), the Court also noted but did not pass upon *Miranda Fuel*. *See also* Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971). It seems that the Court has avoided coming to grips with *Miranda Fuel*.

69. 386 U.S. at 189.

70. *Id.* at 192-93. Compare the following statement of the Board in Newspaper Guild Local 26 (Buffalo-Courier Express, Inc.), 220 N.L.R.B. 79, 89 (1975):

> We agree with the Administrative Law Judge's conclusion that, although it is not a function of the Board to decide the merits of a grievance in determining whether a labor organization has unlawfully failed or refused to process it, "some evaluation of the grievance or grievances at issue must be made." While the General Counsel is not required to show that the grievance is *prima facie* meritorious, it must at least appear from the record that the grievance is not clearly frivolous.

In *Vaca*, the Court summed up its view of the duty of fair representation and the standard to be applied in determining breach of the duty as follows:

It is clear from the foregoing that there are several major deficiencies in the *Miranda Fuel* decision, quite apart from the questions raised by its subsequent application. The finding of a section 8(b)(2) and 8(a)(3) violation without proof of discriminatory motivation appears flatly inconsistent with the scheme of those sections as articulated in such cases as *Radio Officers* and *Local 357*.[71] The finding of an independent section 8(b)(1)(A) violation, as discussed more fully later, appears completely inconsistent with the language and purpose of that section. Further, the predicate for the violation found was not an arbitrary or invidious action such as that proscribed by *Steele* and its progeny—particularly *Vaca*—but rather the Board's different interpretation of the contract terms from that of the union. The essential vice of *Miranda Fuel* seems to be that it rested upon the Board's subjective appraisal of reasonableness, not of arbitrariness or invidiousness.

II. EXPANSION OF THE *Miranda Fuel* DOCTRINE TO NEW BASES OF UNION ACTION

In spite of its uncertain foundation in national labor relations theory and the refusal by the Second Circuit to enforce the Board's order, *Miranda Fuel II* soon became established Board doctrine. The Board has steadily expanded its application of this doctrine to invalidate a variety of bases for union action or inaction.

A. *Racial Discrimination*

The Board has consistently held that union action predicated upon racially discriminatory motivations constitutes a breach of the duty of fair representation. In *Metal Workers Union Local 1 (Hughes Tool Co.)*[72] two locals were jointly certified. One represented black employees in the unit and the other represented white employees. The white local refused to process a black employee's grievance. The Board found that the union's action, motivated by racial discrimination, was a refusal to represent the employee, thereby restraining his section 7 right to fair representation. The dissenting members re-

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Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. . . . A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.

386 U.S. at 177, 190.

71. *See* notes 48-51 *supra* and accompanying text.

72. 147 N.L.R.B. 1573 (1964). Members Leedom, Brown, and Jenkins for the majority. Former Chairman McCulloch and Member Fanning concurring in part and dissenting in part. *See generally* W. GOULD, BLACK WORKERS IN WHITE UNIONS 163-206 (1977); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962).

peated their view that neither section 7 nor section 8(b)(1)(A) encompasses a duty of fair representation that could be the predicate for an unfair labor practice.[73] The dissenters would have found a violation of section 8(b)(1)(A) only on the ground of the union's conceded failure to process the grievance because of the black employee's nonmembership in the white local.

The majority also found that the failure to process the grievance violated section 8(b)(2) because the employee was denied treatment that he would have received had he been eligible for membership in the white local. Relying upon the *Miranda Fuel* rationale—that union action based upon arbitrary or irrelevant reasons or upon the basis of an unfair classification violates the Act—the majority found that the union's failure to act, based upon such reasons, was equally a violation. The dissenting members repeated their position that section 8(b)(2) proscribes only discrimination that relates to "union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations."[74] They would have found no union attempt to cause employer discrimination within the meaning of section 8(b)(2) since the contract was not in issue nor had the union sought any employer action concerning the grievance.

Similarly, in *Local 12, United Rubber Workers (Business League of Gadsden)*,[75] the union refused to process grievances of Negro employees who claimed back wages for layoffs resulting from the racially discriminatory seniority system previously followed by the parties and sought the elimination of racial segregation in plant facilities and services. The Board found that the union's refusal was based "upon the racially invalid interpretation" that had been placed upon the current and prior contracts, that the union would have processed the grievances to arbitration but for those "racially discriminatory reasons," and that the union thereby violated sections 8(b)(1)(A), 8(b)(2) and 8(b)(3).[76] The Board stated:

> We are not to be understood as holding that the Respondent or any labor organization must process to arbitration any grievance other than the precise areas discussed herein. We hold only that where the record demonstrates that a grievance would have been processed to arbitration but for racially discriminatory reasons, the failure so to process it violates the Act because the statutory agent's duty is to represent without regard to race. . . . [W]hatever may be the bases on which a statu-

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73. 147 N.L.R.B. at 1586-90 (Members McCulloch and Fanning dissenting).

74. *Id.*

75. 150 N.L.R.B. 312 (1964).

76. *Id.* at 317. Members Leedom, Brown, and Jenkins composed the majority. Former Chairman McCulloch and Member Fanning dissented based upon the views in their dissent in *Miranda Fuel II* and their separate opinion in *Hughes Tool Co.* *See* text accompanying notes 59 and 74 *supra*.

> tory representative may properly decline to process grievances, the bases must bear a reasonable relation to the union's role as bargaining representative or to its function as a labor organization; manifestly, racial discrimination bears no such relationship.[77]

With regard to the refusal to process grievances calling for the desegregation of plant facilities, the Trial Examiner had found the union's action within the range of discretion allowed a union to determine what demands to make in bargaining and when to make them. The Board disagreed, stating that "a statutory representative's conduct to maintain an unlawful end [segregated facilities] finds no defense in the representative's belief, however sincerely held, that the end is desirable."[78]

In its enforcement of the Board's decision,[79] the Fifth Circuit agreed with the Board's *Miranda Fuel II* doctrine to the extent of holding that a union's breach of the duty of fair representation is an unfair labor practice under section 8(b)(1)(A).[80] Disagreeing with the Second Circuit's approach in *Miranda Fuel II*, the Fifth Circuit stated that it was "convinced that the duty of fair representation implicit in the exclusive-representation requirement in Section 9(a) of the act comprises an indispensable element of the right of employees 'to bargain collectively through representatives of their own choosing' as guaranteed in Section 7."[81] By summarily refusing to process the grievances, the union had restrained the employees in the exercise of their section 7 rights in violation of section 8(b)(1)(A). The court further found irrelevant that the union's conduct did not encourage or discourage union membership because the language of section 8(b)(1)(A), unlike that of sections 8(b)(2) and 8(a)(3), is not restricted to discrimination that encourages or discourages union membership.

In *Local 1367, International Longshoremen's Association (Galveston Maritime Association)*,[82] the Board found that a local union made up of white members only, and its parent district organization, violated section 8(b)(1)(A) by maintaining and enforcing a work apportionment agreement with the employer that provided for a 75-25

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77. 150 N.L.R.B. at 317 (citation omitted).

78. *Id.* at 319. The Board reaffirmed the proposition that the duty of fair representation applies to union members and nonmembers alike. "We submit that a union's duty not to discriminate unfairly against nonmembers in presenting grievances . . . is no different from its duty not to discriminate unfairly against members in presenting grievances, and that the touchstone is not the irrelevant consideration of membership but the relevant requirement of fair representation of all employees in the unit." *Id.* at 320.

79. Local 12, United Rubber Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

80. Having found that the union's conduct violated § 8(b)(1)(A), the court did not consider it necessary to reach the § 8(b)(2) and 8(b)(3) findings of the Board.

81. 368 F.2d at 17.

82. 148 N.L.R.B. 897 (1964).

percent work distribution between the white local and a black sister local.[83] The Board also found unlawful a "no-doubling" provision of the agreement which forbade the assignment of white and black crews to work together. The Board found that the clauses constituted segregation or discrimination resulting from inherently unequal and unfair representation, and that the union had thereby "failed to comply with their duty as an exclusive bargaining representative to represent all employees in the bargaining unit fairly and impartially."[84] The Board also held that perpetuation of the discriminatory provisions as a condition of employment "grounded upon membership" violated section 8(b)(2) because it caused the employer to violate section 8(a)(3).[85] The Fifth Circuit, in a per curiam decision citing its opinion in *Local 12, Rubber Workers*, enforced the Board's order.[86] In a concurring opinion, Judge Choate agreed that the facts of the case reflected a breach of the union's duty of fair representation that constituted an unfair labor practice. He stated further:

> However, I fully realize that here the Board is treading perilous waters by taking over the duties of unions. By far, the preferable procedure is to let individuals take ordinary steps, such as filing suit, to adjust such grievances. The reasoning in *Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO v. N.L.R.B.*, 5th Cir., 368 F.2d 12, No. 22239, in my opinion tends to set a dangerous precedent, in that it puts the court in the position of approving the Board's action in telling a labor union (a private organization) how to perform its functions. My concurrence is largely upon the basis of expediting the remedy in a case of clear fault, rather than approving the method employed, which I recognize could be most destructive of unions if carried forward to any extent by the Board.[87]

As stated above, the Board also held in *Local 1367* that the duty of fair representation was included in the union's duty to bargain

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83. The Board indicated its refusal to acquiesce in the Second Circuit's *Miranda Fuel II* rejection, stating: "With due deference to the circuit court's opinion, we adhere to our previous decision until such time as the Supreme Court of the United States rules otherwise." *Id.* at 898 n.7.

84. *Id.* at 898.

85. Again, Members Leedom, Brown, and Jenkins composed the majority, and Former Chairman McCulloch and Member Fanning dissented from the § 8(b)(1)(A) finding but agreed with a violation of § 8(b)(2) to the extent that the work distribution and no-doubling arrangements were based upon considerations of local union membership.

86. NLRB v. Local 1367, Int'l Longshoremen's Ass'n, 368 F.2d 1010 (5th Cir.), *cert. denied*, 389 U.S. 837 (1966). Chief Judge Hutcheson dissented, and Senior District Judge Choate concurred.

87. 368 F.2d at 1010 (Choate, J., concurring). *See* NLRB v. Longshoremen's Local 1581 (Manchester Terminal Corp.), 489 F.2d 635 (5th Cir.), *cert. denied*, 419 U.S. 1040 (1974), *enforcing* 196 N.L.R.B. 1186 (1972), in which the court upheld the Board's finding that the union violated § 8(b)(2) and (1)(A) by giving hiring hall preference based upon citizenship and the national residence of the employee's family. The Board's decision was not in fact predicated upon a *Miranda Fuel* rationale, but the court found support for its holding in *Miranda Fuel* and again endorsed the doctrine.

collectively under sections 8(b)(3) and 8(d) of the Act.[88] The Board found that a union's section 8(b)(3) bargaining duty ran not only to the employer but to the bargaining unit employees as well. The Board stated:

> We hold that under the National Labor Relations Act a labor organization's duty to bargain collectively includes the duty to represent fairly as that duty has been enunciated in the line of cases of which *Steele v. L & N Railroad*, 323 U.S. 192 (1944) was the first. Section 8(d) speaks, *inter alia*, of a mutual obligation of employers and unions "to confer in good faith" and to sign "any agreement reached." These quoted phrases contemplate, in our opinion, only lawful bargaining and agreements, for the statute does not sanction the execution of agreements which are unlawful. Because collective-bargaining agreements which discriminate invidiously are not lawful under the Act, the good-faith requirements of Section 8(d) necessarily protect employees from infringement of their rights; and both unions and employers are enjoined by the Act from entering into contractual terms which offend such rights. Contrary to the Trial Examiner, Section 8(d) cannot mean that a union can be exercising good faith toward an employer while simultaneously acting in bad faith toward employees in regard to the same matters. Section 8(d), as all other provisions of the Act, was written in the public interest, not just in the interest of employers and unions, and it is not in the public interest for patently invalid provisions to be included in collective labor agreements. We conclude that when a statutory representative negotiates a contract in breach of the duty which it owes to employees to represent all of them fairly and without invidious discrimination, the representative cannot be said to have negotiated the sort of agreement envisioned by Section 8(d) nor to have bargained in good faith as to the employees whom it represents or toward the employer.[89]

Accordingly, the Board concluded that the union violated section 8(b)(3) by the contractual establishment, maintenance and enforcement of the discriminatory work apportionment provisions.

Since *Local 1367*, the Board has done little to implement its novel addition of sections 8(b)(3) and 8(d) to its *Miranda Fuel* arsenal. There appears to be nothing in the history of sections 8(b)(3) and 8(d) nor the precedents thereunder that supports such incorporation of the duty of fair representation, particularly because

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88. Section 8(b)(3) makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a)." Section 8(d) provides in part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

See note 64 *supra* and cases there cited.

89. 148 N.L.R.B. at 899-900.

section 8(b)(3) essentially represents the counterpart of the employer's duty to bargain in good faith under section 8(a)(5). Assuming the validity of the underlying *Miranda Fuel* rationale as applied to racial discrimination, for example, the union embodiment of such a practice in the terms of a contract would logically violate section 8(b)(3). Yet since sections 8(b)(2) and (1)(A) as construed by the Board are broad enough to encompass the unlawful provision there seems little justification for adding the section 8(b)(3) violation.

The NLRB General Counsel recently found[90] that, under *Miranda Fuel*, a union composed primarily of black members (Local 1-A) breached its duty of fair representation in violation of section 8(b)(1)(A) when it refused to merge with a sister union composed primarily of white members (Local 1).[91] The locals were historically racially segregated. Local 1-A resisted the efforts of the international union to merge the locals because Local 1-A feared it would lose its voice and effectiveness as part of a merged organization. In the General Counsel's view:

> [B]y refusing to merge, Local 1-A is acting in derogation of the long term interests of its members and has thus breached its duty of fair representation. By continuing its separate existence, Local 1-A has deprived its members of the opportunity to obtain more and higher-paying jobs. Moreover, by maintaining a largely segregated membership, Local 1-A is acting at odds with the policy embedded in Title VII of the Civil Rights Act of 1964.[92]

Further, the NLRB General Counsel has taken the position that, under *Miranda Fuel*, a union has an affirmative obligation to attempt to correct or rectify racial discrimination in employment.[93] Thus, in one case the General Counsel concluded that a union violated Section 8(b)(1)(A) by refusing the employer's offer to rectify past

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90. Section 10(b) of the Act vests the Board or its agent with broad discretionary power with respect to the issuance of unfair labor practice complaints. NLRB v. Indiana & Michigan Elec. Co., 318 U.S. 9, 18 (1943). Section 3(d) confers this power upon the General Counsel of the Board, and provides that he shall have "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints before the Board." *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Saez v. Goslee, 463 F.2d 214 (1st Cir.), *cert. denied*, 409 U.S. 1024 (1972), and cases there cited. Because the General Counsel plays a major role not only in the enforcement but also in the formulation and development of national labor policy, his determinations are highly relevant to any meaningful analysis of NLRA doctrine. And, of course, the General Counsel does, in fact, adjudicate unfair labor practice claims whenever he declines to issue a complaint. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 141, 148 (1975).

91. NLRB Gen. Counsel Q. Rep., [1977] 94 LAB. REL. REP. (BNA) 154, 157-159.

92. *Id.* at 158. The General Counsel also authorized a complaint in the case on the rationale of Local 106, Glass Bottle Blowers Ass'n (Owens-Illinois, Inc.), 210 N.L.R.B. 943 (1974), *enforced*, 520 F.2d 695 (6th Cir. 1975), that maintenance of separate locals segregated by race, as with the segregation based on sex in *Owens-Illinois*, violated § 8(b)(1)(A) because racial separation tended to generate a feeling of inferiority among Local 1-A members as to their work status, and, in fact, limited them to fewer and lower-paying jobs.

93. NLRB Gen. Counsel Q. Rep., [1975] LAB. REL. YEARBOOK (BNA) 246-49.

racial discrimination in its hiring policies.[94] In the General Counsel's view, "the exclusive bargaining representative under Section 9(a) of the Act has an affirmative obligation to seek to correct it, at least to the extent of accepting the Employer's offer to rectify it where such acceptance will not conflict with the contract, an outstanding arbitration award, or prejudice the rights of other employees in the unit."[95] The General Counsel concluded that even if it could not be proven at trial that racial discrimination existed, nevertheless the disproportion of blacks to whites in the unit showed that there was prima facie merit to the employee's complaint to the union that racial discrimination did exist. Therefore, said the General Counsel, "where the employer makes an effort to correct that which appears *prima facie* to be discrimination, the union's failure to accept the employer's offer was considered to be at odds with the Union's section 9(a) obligation of fair representation and, in consequence, a violation of section 8(b)(1)(A) of the Act."[96]

As a matter of social policy, one can hardly criticize the Board's application of the *Miranda Fuel* doctrine in the racial discrimination context. The essential question remaining, however, is not the desirability of what the Board is achieving, but the legal propriety of its action within the scope of the limited charter given it by the NLRA.

B. *Sex Discrimination*

In *Owens-Illinois*[97] the Board found that the union violated section 8(b)(1)(A) by maintaining separate locals whose memberships were determined solely upon the basis of sex, by separately processing grievances of male and female unit members, and by refusing to process grievances because of the unit members' sex. Three members of

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94. *Id.*

95. *Id.* at 248.

96. *Id.* at 249. The General Counsel also stated:

> While it may be argued that the E.E.O.C. has been directly charged with implementation of Title VII of the Civil Rights Act, this was not viewed as ousting the Board from enforcing the Union's obligations to unit employees under 9(a) and 8(b) of the Act. In this regard, the Board had indicated that, in enforcing the NLRA, it would take into account other Federal policies.

Id. *See* Carpenters Local 22 (Graziano Constr. Co.), 195 N.L.R.B. 1, 2 n.5; Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 69-73 (1975). In one case, the General Counsel took the position that a union does not violate § 8(b)(1)(A) when it gives hiring hall referral preference to minority applicants in order to assist employers in meeting their affirmative action obligations. The General Counsel found that the disparate treatment based on the usually unlawful criterion of race was permissible because in effect required by governmental agencies, as well as serving the legitimate union interests of furthering "the national good of affording minorities equal employment opportunity" and preserving employment opportunities for all registrants by decreasing the possibility that employers would lose government contracts. NLRB Gen. Counsel Q. Rep., [1977] 96 LAB. REL. REP. (BNA) 1, 7.

97. Local 106, Glass Bottle Blowers Ass'n (Owens-Illinois, Inc.), 210 N.L.R.B. 943 (1974), *enforced*, 520 F.2d 693 (6th Cir. 1975). *See* Bell & Howell Co., 230 N.L.R.B. No. 57, 95 L.R.R.M. 1333 (1977).

the Board (Former Chairman Miller and Members Fanning and Jenkins) were of the view that separate but equal treatment based upon sex was as invalid as such treatment based upon race. Relying upon *Brown v. Board of Education*,[98] the majority found that in both areas separation in and of itself connotes and creates inequalities.[99] The extent to which the decision rests upon *Miranda Fuel* is not clear, although Chairman Miller expressed the view that the violation arose out of the union's failure to fairly represent the employees and that separate but equal representation is not fair representation within the meaning of *Miranda Fuel*. Thereafter, in *Pacific Maritime Association*[100] the Board adopted without comment the decision of the administrative law judge that held that a union breached its duty of fair representation by refusing to register and dispatch women based upon the irrelevant, invidious, and unfair consideration of their sex.[101]

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98. 347 U.S. 483 (1954).

99. The Board reasoned as follows:

> Separate but equal treatment on the basis of sex is as self-contradictory as separate but equal on the basis of race. In both areas separation in and of itself connotes and creates inequalities. Not only can separating females from males solely because of sex generate a feeling of inferiority among the females as to their work status, since the policy of separation is usually interpreted as reflecting the inferiority of the females, but also it can . . . adversely affect the working conditions of both groups solely because of the difference in sex.
>
> . . . [A] grievance affects both male and female employees regardless of which Local processes the grievance, the employees whose Local did not process a grievance merely because of the grievant's sex are nonetheless bound by the outcome of the other Local's processing of the grievance. These employees have, therefore, solely because of sex, been denied a voice in the resolution of matters affecting their working conditions.

210 N.L.R.B. at 943-44.

Member Penello concurred on the ground that there was an actual nexus between the discriminatory conduct and interference with employees' § 7 rights. In his view there was a direct relationship between the separate processing of male and female grievances based upon sex and the employees' § 7 right to have a voice in the processing of grievances whose outcome would affect terms and conditions of employment.

Member Kennedy concurred in part and dissented in part. In his view the separate processing of grievances violated § 8(b)(1)(A) but the maintenance of separate locals did not because the contract applied equally to all employees regardless of sex or local membership and no distinction had been made in grievance handling. Member Kennedy regarded the majority opinion as inconsistent with Jubilee Mfg. Co., 202 N.L.R.B. 272 (1973), *enforced per curiam*, 504 F.2d 271 (D.C. Cir. 1974), which held that employer discrimination based upon race, color, religion, sex, or national origin standing alone is not inherently destructive of § 7 rights, and that there must be actual evidence of a nexus between the alleged discriminatory conduct and § 7 rights. *But cf.* United Packinghouse Workers v. NLRB., 416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969) (employer discrimination aganst black and Latin American employees in working conditions constituted a § 8(a)(1) violation).

100. 209 N.L.R.B. 519 (1974).

101. Member Fanning, concurring, did not rely on the *Miranda Fuel* rationale but on the reasons stated in Operating Eng'rs Local 18 (Ohio Contractors Ass'n), 204 N.L.R.B. 681 (1973), *remanded*, 496 F.2d 1308 (6th Cir. 1974), *dec. on remand*, 220 N.L.R.B. 147 (1975), *enforcement denied*, 555 F.2d 552 (6th Cir. 1977), and in his separate opinion in International Bhd. of Painters (W. J. Siebenoller, Jr., Paint Co.), 205 N.L.R.B. 651, 652-53 n.4. In the *International Union of Operating Engineers* case, the Board stated as follows regarding § 8(b)(2):

> When a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption

The NLRB General Counsel has taken the position that a union breaches its duty of fair representation under *Miranda Fuel* by being party to a sexually discriminatory health insurance plan that provided pregnancy coverage for wives of male employees but not for female employees.[102] In one case, the collective bargaining agreement simply provided that the employer should maintain hospital and major medical coverage. The employer had independently obtained the plan from an insurance carrier.[103] Upon inquiry of a pregnant female employee concerning payment of her medical bills related to pregnancy, the union advised the employee it would look into the matter. The employee was denied coverage and filed an unfair labor practice charge. The General Counsel found sex discrimination because granting pregnancy coverage to wives of male employees but not to female employees could impact negatively upon female employees who, unlike male employees, would be financially responsible for payment of all medical bills related to pregnancies within their families. In the General Counsel's view, the union breached its duty of fair representation because its acquiescence in the employer's maintenance of discriminatory terms and conditions of employment constituted arbitrary and invidious treatment of employees.

> Thus, a Section 9(a) statutory representative has an obligation not to be a party, by agreement or acquiescence, to a sexually discriminatory employment practice. And particularly where an affected employee has requested Union action to remedy the discrimination and the Union fails to take any remedial action, the Union arguably breaches its statutory obligation.[104]

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that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only where the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

204 N.L.R.B. at 681. One might question whether or not the Board's § 8(b)(2) analysis not only remains inconsistent with *Local 357*, but also improperly resurrects the discarded *Pacific Intermountain Express* doctrine. *See* notes 45-51 *supra* and accompanying text.

Member Jenkins, concurring, agreed with the majority's reliance upon the *Miranda Fuel* rationale, but also found that there was a nexus between the unions' conduct and the employees' § 7 rights which would further support the finding of a § 8(b)(1)(A) violation.

102. NLRB Gen. Counsel Q. Rep., [1977] 95 LAB. REL. REP. (BNA) 81, 88-89.

103. *Id.*

104. *Id.* at 89. The General Counsel found that the situation was distinguishable from one in which the employer alone discriminates on the basis of sex. Jubilee Mfg. Co., 202 N.L.R.B. 272 (1973), *enforced per curiam*, 504 F.2d 271 (D.C. Cir. 1974), holds that such conduct standing alone does not violate the NLRA. The General Counsel also distinguished General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), in which the Court found no violation of Title VII of the Civil Rights Act of 1964 in the exclusion of pregnancy benefits from an employee disability plan, on the ground that, unlike *General Electric*, the case before him involved a plan that was worth more in receivable benefits to male employees than to female employees. *See* Nashville Gas Co. v. Satty, 98 S. Ct. 347 (1977).

C. *Exercise of Section 7 Rights*

The Board has found that unions have violated the duty of fair representation in a variety of situations in which the unions' actions are essentially based upon or in retaliation against employee activities protected by section 7. Thus, for example, the union may not base its action upon such irrelevant or invidious considerations as the unit employee's nonmembership in the union,[105] the unit employee's intra-union activity,[106] nor the unit employee's having filed charges with the Board or other agencies.[107]

D. *Merger and Political Expediency*

The Board has also held that a union breaches its duty of fair representation when its discriminatory actions are predicated upon the basis of political expendiency. In *Red Ball Motor Freight Inc.*,[108] for example, the Board found that one of two unions competing in an

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105. *E.g.*, Machinists Local 697 (H.O. Canfield Rubber Co.), 223 N.L.R.B. 832 (1976) (refusal to process the grievance of a nonmember unit employee unless he paid the union the costs it incurred in processing the grievance where no similar fees were required of members); Typographical Union Local 122 (Kalamazoo Gazette), 193 N.L.R.B. 1065 (1971) (causing members to ostracize employee because of her past nonunion status and antiunion activity under employment elsewhere); Port Drum Co., 170 N.L.R.B. 555 (1968) (refusal to arbitrate because of the unit employees' nonmembership in the union). For further examples of the operation of this principle in Board decisions, see Local 2088, IBEW (Fed. Elec. Corp.), 218 N.L.R.B. 396, 402 (1975); IBEW Local 1504 (W. Elec. Co.), 211 N.L.R.B. 580 (1974); Truck Drivers Local 807, 207 N.L.R.B. 259 (1973), *enforcement denied*, 506 F.2d 1382 (2nd Cir. 1974); Teamsters Local 186 (United Parcel Serv.), 203 N.L.R.B. 799 (1973), *enforced in part sub nom.* NLRB v. Local 396, Int'l Bhd. of Teamsters, 509 F.2d 1075 (9th Cir. 1975); UAW Local 1303 (Jervis Corp.), 192 N.L.R.B. 966 (1971); Lodge 656, Int'l Bhd. of Boilermakers (Combustion Eng'r, Inc.), 188 N.L.R.B. 865 (1971).

106. *E.g.*, Teamsters Local 886 (Lee Way Motor Freight, Inc.), 229 N.L.R.B. No. 132, 95 L.R.R.M. 1137 (1977) (threat to cause discharge if employee persisted in protesting intra-union election); Local 485, IUE (Automotive Plating Corp.), 170 N.L.R.B. 1234 (1968) (refusal to process grievance because employee had criticized union business manager at union meeting), *enforced in part*, 454 F.2d 17 (2d Cir. 1972). *See* Local 282, Int'l Bhd. of Teamsters (Explo, Inc.), 229 N.L.R.B. No. 11, 95 L.R.R.M. 1202 (1977); Newspaper Guild Local 26 (Buffalo Courier-Express, Inc.), 220 N.L.R.B. 79 (1975); Pacific Intermountain Express Co., 215 N.L.R.B. 588 (1974); E.L. Mustee & Sons, Inc., 215 N.L.R.B. 203 (1974); Architectural Prods. Div., H.H. Robertson Co., 212 N.L.R.B. 637, 642 (1974); Alcoa Constr. Systems, Inc., 212 N.L.R.B. 452 (1974); Sargent Elec. Co., 209 N.L.R.B. 630 (1974); United Rubber Workers Local 374 (Uniroyal, Inc.), 205 N.L.R.B. 117 (1973).

107. *E.g.*, King Soopers, Inc., 222 N.L.R.B. 1011 (1976) (refusal to arbitrate because employee has filed charges with the Board); Local 624, Plumbers (Power Piping Co.), 211 N.L.R.B. 942 (1974) (refusing use of hiring hall to "travelers" because they had filed charges with the Board); Teamsters Local 186 (United Parcel Serv.), 203 N.L.R.B. 799 (1973) (threat to deny representation to members if they invoked Board processes; remedy included order to arbitrate and payment of counsel fees), *enforced in part*, 509 F.2d 1075 (9th Cir. 1975). *See* Longshoremen's Local 814 (West Gulf Maritime Ass'n), 215 N.L.R.B. 459 (1974); Typographical Union Local 6 (Artintype, Inc.), 213 N.L.R.B. 925 (1974); Architectural Prods. Div., H.H. Robertson Co., 212 N.L.R.B. 637 (1974); Local 703, Int'l. Bhd. of Teamsters (Dominick's Finer Foods, Inc.), 188 N.L.R.B. 873 (1971), *enforced*, 81 L.R.R.M. 2488 (7th Cir. 1972); NLRB Gen. Counsel Q. Rep., [1975] LAB. REL. YEARBOOK (BNA) 246-49.

108. 157 N.L.R.B. 1237 (1966), *enforced sub nom.* Truck Drivers Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967).

election among employees of a merged operation violated section 8(b)(1)(A) by promising to give its members, the numerically larger number of voters, seniority over members of the competing union. The promise was based solely upon the union's political motive of winning the election and not upon objective factors relevant to the merger problems or involving the merits of dovetailing.[109]

The D.C. Circuit enforced the Board's order,[110] agreeing that the threatened action would violate the union's duty of fair representation and that such a threat was itself a violation. The court found that the promise of illegal action combined with the illegal promise impairing the employees' freedom of choice violated section 8(b)(1)(A).

> Section 7 . . . is instinct with the idea of free choice. If it means anything at all, it is that employees shall not be subjected to improper pressures or influences in their selection of a union to represent them. On this record the Board has found on adequate evidence that UTE arbitrarily adopted and announced a bargaining policy on seniority merger motivated only by a desire to win the votes of a majority of the employees at the Airport Drive terminal. The actual effectuation of that policy would, under the circumstances, constitute a default by UTE in its obligation to represent fairly all the employees in the unit for which it becomes the exclusive bargaining representative.[111]

The court noted that merger situations involve difficult problems of reconciling the conflicting interests of previously independent groups of employees, and that many solutions have been tried. However, the court recognized that while it was not its function to prefer any one solution it was clear that the union had renounced any good faith effort to reconcile the group's interests. The union had failed to proffer any reason for preferential treatment of one group "other than the purely political motive of winning an election."[112]

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109. The trial examiner, whose decision was adopted by the Board, stated that:
[T]he promised action in this case does not reflect the kind of compromise between competing interests which collective bargaining daily requires, but would serve the interests of UTE and the majority of the employees in the unit it sought to represent with hostility to those of the minority. I find that in the circumstances of this case and in the absence of any *demonstrated reasonable basis* for the discrimination UTE proposed to practice against the Abbey Street employees, it promised to take action following certification which would have been unlawful under *Miranda Fuel* . . . and therefore violated Section 8(b)(1)(A).
157 N.L.R.B. at 1245 (emphasis added).

110. Truck Drivers Local 568 v. NLRB, 379 F.2d 137 (D.C. Cir. 1967).

111. *Id.* at 144-45.

112. *Id.* at 143. The court commented that:
The merger situation poses notoriously difficult problems in accommodating the interests of theretofore independent groups of employees. It frequently, although by no means invariably in an expanding economy, raises the dread spectre of job-loss for workers with relatively long records of stable employment. Many different formulae for reconciliation have been attempted, and more have been suggested, as methods for alleviating the discord over seniority when two groups of employees are joined. But it seems clear to us, as it did to the Board on the undisputed evidence before it, that UTE has renounced any good faith effort to reconcile the interests of the employees formerly at the Abbey Street depot with those at the Airport Drive terminal. It

The court noted further that treating such a breach of the duty of fair representation as an unfair labor practice presented a substantial legal question, but generally endorsed the Board's *Miranda Fuel II* doctrine. The court stated:

> [T]he standards to be applied in determining what union acts of commission or omission are in violation of its duty of fair representation under the Act remain largely to be drawn. Only recently has the Board begun to articulate the characteristics of unfair representation as it has begun more actively to entertain complaints of this nature. On the narrow question before us, we need not concern ourselves with what may eventually prove to be the precise contours of a union's duty fairly to represent all of the employees for whom it speaks, for there are cases which indicate that union action taken solely for the considerations of political expediency, and unsupported by any rational argument whatsoever, is in violation of representational responsibilities.[113]

Similarly, in *Barton Brands Ltd.*,[114] the Board held that union action predicated solely upon partisan political reasons breaches the duty of fair representation. A union officer rejected a dovetailing arrangement in a merger situation and created an endtailing arrangement in order to win votes for union office. The Board found violations of sections 8(b)(2), (1)(A), 8(a)(3), and (1), stating:

> We cannot agree with the Administrative Law Judge when he sanctions the union conduct here on the theory that union officials like politicians must take action to curry favor with the majority of employees in order to insure their reelection and that a candidate for office cannot prevail unless he convinces a majority of the electorate to support him. An elected union official doubtless has a need to develop and to maintain his constituency, like any politician in any other context. However, as a union official, he is under a statutory duty to see that all employees are fairly represented, and he may not lawfully violate that duty by causing interference in the employment relationship of any employees in the unit upon arbitrary grounds solely to advance his own personal political ambition within the Union.[115]

The Board has thus made clear a number of proscribed reasons for union conduct that will constitute a breach of the duty of fair representation. Union action motivated by political considerations as

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raised no questions with respect to the merits of dovetailing, such as that some jobs are more difficult of execution or require more training than others. There has been an indication that the Abbey Street operation was unsuccessful and that its employees, had they not followed the work to Airport Drive, would have lost their jobs altogether. UTE has, in sum, failed to come forward with any reason at all for preferring Airport Drive employees other than the purely political motive of winning an election by a promise of preferential representation to the numerically larger number of voters.

Id. at 142-43. *See generally* Humphrey v. Moore, 375 U.S. 335 (1964), discussed in notes 67 and 68 *supra*.

113. 379 F.2d at 142.

114. 213 N.L.R.B. 640 (1974), *enforcement denied*, 529 F.2d 793 (7th Cir. 1976).

115. *Id.* at 641-42.

well as that predicated on race and sex discrimination is proscribed under the *Miranda Fuel* doctrine.

E. *Unexplained Union Action*

Union conduct based upon no reason has also been found violative of the unfair labor practices provisions by the Board. Thus, in *General Truck Drivers, Local 315 (Rhodes & Jamieson, Ltd.)*,[116] the Board held that, at the least, a union must have a reason for the action that it takes, and absent a reason the conduct will be deemed arbitrary and in breach of the union's duty of fair representation in violation of section 8(b)(1)(A). The Board stated:

> The prohibition of decisionmaking supported by no reason, as well as decisionmaking for impermissible reasons, is a modest enough beginning for us. Although an employer may discharge an employee for no reason at all without violating the Act, we held in *Miranda Fuel* that unions have obligations to employees they represent that employers do not. And if a duty to avoid arbitrary conduct, as part of an affirmative, fiduciary responsibility, means anything, it must mean at least that there be a reason for action taken. Sometimes the reason will be apparent, sometimes not. When it is not the circumstances may be such that we will have no choice but to deem the conduct arbitrary if the union does not tell us what it is.[117]

The Board further found that the union breached its duty of fair representation when, following a layoff, it submitted to majority vote of the unit employees the question of layoff reassignment rights, despite the existence of a contractual provision that already clearly defined those rights.[118] Thus, according to the Board, the union wrongfully delegated to a group of its members its duty of fair and impartial treatment. The method used, the referendum, did not meet the minimum statutory standard of fairness. The Board was troubled by several aspects of the referendum: while only dump truck drivers were included in the announced layoff, the ballot covered other employees as well; the ballot did not adequately describe the contractual bumping provision; what information the voters had with which to evaluate the matter was unclear; there was no evidence that affected employees had been allowed to make their views known to the voting employees; the vote was not taken until after the layoff was announced; and there was an inherent conflict of interest because those voting would be adversely affected by a vote to permit bumping. The Board stated that: "The duty of fair representation being an affirmative duty, the obligations it encompasses cannot be avoided by delegating the authority

116. 217 N.L.R.B. 616 (1975), *enforced*, 545 F.2d 1173 (9th Cir. 1976).

117. 217 N.L.R.B. at 618.

118. *Id.* at 616-17. *See* Kling v. NLRB, 503 F.2d 1044 (9th Cir. 1975).

to make decisions."[119] The Board noted that while the union could have applied the contract in a way that would have defeated the employee's bumping right, the violation lay in the lack of fairness of the decision-making process. "Implicit in *Miranda Fuel* is the idea that a union breaches its fiduciary duty when it deprives some employees of their clear contractual rights because a majority of its members want it to."[120] The Board noted that even in precontract negotiation situations, where the employees rights are not yet established, the union breaches its duty when it pits a majority group against a minority as a basis for its bargaining position in order to win political advantage.[121] The Board stated that it might have been permissible for the union to submit to majority vote prospectively the question whether the contractual mutual bumping benefits should operate in general. The Board stated generally:

> The duty of fair representation was conceived as a protection for employees faced with the reduction of their individual rights corresponding with the grant of power to unions to act as their exclusive collective bargaining representatives. Since its conception this duty "has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law" [citing Vaca v. Sipes, 386 U.S. 171, 182 (1967)]. Were it held powerless to protect the employee in this case where the Union permitted, in the exercise of its power, what would be only a slight exaggeration to call a mockery of fair procedures, this bulwark will have proved to be as illusory as the Maginot Line. We find that by the manner in which Respondent Union undertook to prevent Holman from being reassigned it violated Section 8(b)(1)(A) of the Act.[122]

Assuming *arguendo* that the breach of the duty of fair representation is an unfair labor practice, application of the doctrine to invalidate union action predicated upon such invidious grounds as race and sex is clearly within the scope of the doctrine as developed by the courts since *Steele*. Union action based upon such grounds certainly is encompassed in the *Vaca* standards of arbitrary, discriminatory, or

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119. 217 N.L.R.B. at 619.

120. *Id.*

121. *See* Barton Brands, Ltd., 213 N.L.R.B. 640 (1974), *enforcement denied*, 529 F.2d 793 (7th Cir. 1976); Red Ball Motor Freight, Inc., 157 N.L.R.B. 1237 (1966), *enforced*, 379 F.2d 137 (D.C. Cir. 1967).

122. 217 N.L.R.B. at 619. Member Penello dissented. He found no evidence of arbitrary application of the contract provision, nor of hostile motivation, but rather that the union was acting out of a legitimate concern for other unit employees. While it might have been better to decide the matter prior to a layoff, he believed the union did the next best thing, and that there was no violation by submitting the matter to majority vote. He stated:

> The majority has, in my opinion, substituted speculation for proof that Holman was deprived of his right to participate fully and fairly in the determination of the issue. It has improperly shifted the burden to the Union to prove that its procedures were fair, and has intruded into the internal workings of the Union beyond the point which wisdom and precedent would have dictated.

217 N.L.R.B. at 621.

bad faith conduct. Similarly, action based on irrelevant political reasons would seem to be tantamount to hostile or bad faith conduct. Use of the doctrine by the Board to review and set aside union actions based upon less extreme grounds, however, such as disagreement with union contract or rule interpretation, or dissatisfaction with the adequacy of union justification, does not comport with the stringent *Vaca* standards.

III. EXTENSION OF THE *Miranda Fuel* DOCTRINE TO QUALITY OF REPRESENTATION

At one point in its history the Board held that "[t]he Act protects employees from discrimination by their bargaining representative, but does not guarantee the quality of the representation they receive."[123] Nevertheless, in the course of applying the *Miranda Fuel* doctrine, the Board has expanded it to encompass several aspects of the quality of representation accorded employees by a union.

A. *Representation of the Employee-Grievant*

Under its expanded *Miranda Fuel* doctrine, the Board has held that while a union may lawfully exercise its discretion in refusing to process a grievance or take a case to arbitration,[124] once the union decides to do so it must represent the grievant fully and fairly and act as the grievant's advocate.

In *Truck Drivers Local 705 (Associated Transport)*,[125] for example, the union's agent openly stated at a joint grievance committee meeting that he did not believe the grievant had a valid grievance. The union agent was found by the Board to have breached his duty of fair representation by abdicating his duty to present the grievance in the light most favorable to the grievant. The Board stated:

> In our view, once Respondent undertook to present Aaron Kesner's grievance to the Joint Grievance Board, it became obligated to represent him fully and fairly. This obligation included the duty to act as advocate for the grievant, which here Heim clearly did not do. To the contrary, by saying that he did not believe Aaron Kesner's claim was valid, Heim undermined Kesner's case before the Joint Grievance Board.[126]

The Seventh Circuit enforced the Board's order,[127] expressing its view of the statutory basis for *Miranda Fuel* as follows:

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123. Maxam Dayton, Inc., 142 N.L.R.B. 396, 418 (1963).

124. *E.g.*, Retail Clerks Local 3157 (Lit Bros.), 192 N.L.R.B. 1171 (1971). "A labor organization is not required automatically to process a grievance of a unit employee. If, in good faith, it believes that the grievance is without merit, it may refuse to entertain it without running afoul of its duty of fair representation." Carpenters Local 1104 (The Law Co.), 215 N.L.R.B. 537 (1974).

125. 209 N.L.R.B. 292 (1974), *enforced*, 532 F.2d 1169 (7th Cir. 1976).

126. *Id.* at 292. *See* P.P.G. Indus., 229 N.L.R.B. No. 107, 95 L.R.R.M. 1366 (1977).

127. Truck Drivers Local 705 v. NLRB, 532 F.2d 1169 (7th Cir. 1976).

> As the Fifth Circuit observed in *United Rubber Workers Local 12 v. N.L.R.B.*, 368 F.2d 12 . . . the language of section 8(b)(1)(A), unlike certain other provisions of section 8, is not restricted to discrimination which encourages or discourages union membership. While we would have difficulty in saying that a union's failure to act vigorously as an advocate in presenting a grievant's position when it had undertaken to do so would be unrelated to an employee's union membership and activities, we do not propose, in any event, to read into the statute language which the Congress did not put there.[128]

Similarly, in *United Steelworkers* (*InterRoyal Corp.*),[129] the Board held that the union breached its duty of fair representation when at the initial step of a grievance it peremptorily refused to consider certain evidence tendered by the grievant in support of her case. The Board said that the union had a duty to act as the grievant's advocate, and this duty was not met by refusing the grievant's explanation and attempt at proof. According to the Board: "We need find no duty on the Respondent's part to pursue the proof of Beshears' grievance; they rejected her attempt to provide that proof. And it is patently irrelevant that the proof Beshears had in hand on March 24 might not have fully satisfied the Employer—it was not even considered by the Respondents."[130]

In *Truck Drivers Local 692* (*Great Western Unifreight System*),[131] the Board introduced the proposition that negligence is not a breach of the duty of fair representation, and to that extent appeared to establish some limit on the *Miranda Fuel* doctrine. In that case, the union advised a discharged employee that the employee had a meritorious grievance under the contract. Accordingly, the employee filled out a grievance form and left it at the union office. Because the union failed to present the grievance to the employer within the contractual time limits, the employer took the position that the grievance was untimely and lacking in merit. In support of his section 8(b)(1)(A) complaint, the General Counsel contended that the failure to file and process the grievance in a reasonable and timely fashion was attributable to the negligence of the union business agent and that this negligence fell squarely within the definition of "arbitrary" under *Miranda Fuel II*.[132] The Board rejected this contention on the ground that it would not equate "mere negligence"[133] with irrelevant, invidi-

128. *Id.* at 1174.

129. 223 N.L.R.B. 1184 (1976).

130. *Id.* at 1185.

131. 209 N.L.R.B. 446 (1974).

132. The General Counsel cited BLACK'S LAW DICTIONARY (4th ed. 1951) as defining "arbitrary" to mean "done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason." 209 N.L.R.B. 447 n.4.

133. 209 N.L.R.B. at 447.

ous, or unfair considerations that it had defined as arbitrary conduct in *Miranda Fuel II.* The Board stated:

> [I]t is clear that negligent action or nonaction of a union by itself will not be considered to be arbitrary, irrelevant, invidious, or unfair so as to constitute a breach of the duty of fair representation violative of the Act. Something more is required. In the instant case, the modified complaint merely alleges only that the Respondent negligently failed and refused to timely process the meritorious grievance to the serious detriment of the Charging Party. Nothing more is charged. Absent an allegation showing something more than negligence alone, we conclude that the negligent conduct of the Respondent alleged herein does not constitute by itself a breach of the duty of fair representation in violation of Section 8(b)(1)(A) of the Act.[134]

The Board has found, however, that a union breaches its duty of fair representation when it handles a grievance in a perfunctory manner. When a union summarily accepts an employer's uncorroborated assertions or shifting employer reasons concerning a grievant's conduct, fails to consult with the grievant,[135] or fails to investigate and consult with the employer concerning a grievance,[136] the Board may find the union's conduct perfunctory. Deliberate concealment of material facts is clearly regarded as inconsistent with the duty.[137] Conversely, the Board apparently will not find a violation when its review of the record satisfies it that the union has "pursued the grievances not only adequately but also with energy" and has "vigorously and diligently represented the grievants."[138]

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134. *Id.* at 448. Member Fanning reiterated his general disagreement with *Miranda Fuel*, stating:

> I am of the view that a union should be accorded a reasonable amount of discretion in the exercise of its representative function. If every intraunion resolution of a question concerning seniority or grievance were subject to an over-the-shoulder appraisal by the Board for fairness, the burden on unions and the Board ultimately would become intolerable.

Id. at 449. In his view such words as "irrelevant, invidious or unfair" have no meaning unless they are translated into the restraint and coercion covered by § 8(b)(1)(A). For a more current explication of his disagreement with *Miranda Fuel*, see Chairman Fanning's comments in *Handy Andy, Inc.*, 228 N.L.R.B. No. 59, 94 L.R.R.M. 1354, 1363 n.71 (1977).

135. *E.g.*, Phyllis Whitehead, 224 N.L.R.B. 244 (1977) (the Board stated that it rejected any implication that the union's duty of fair representation is analogous to that owed by an attorney to a client and stated, rather, that the duty was analogous to that between legislator and constituent).

136. *E.g.*, Western Exterminator Co., 223 N.L.R.B. 1270, 1282 (1976); Newspaper Guild Local 26 (Buffalo-Courier Express, Inc.), 220 N.L.R.B. 79, 89 (1975); E.L. Mustee & Sons, 215 N.L.R.B. 203 (1974).

137. *E.g.*, Pacific Intermountain Express Co., 215 N.L.R.B. 588, 598 (1974).

138. Teamsters Local 542 (Golden Hill Convalescent Hosp.), 223 N.L.R.B. 533, 533 (1976). The Board there even reviewed the extent to which the union objected to the introduction of adverse testimony at the arbitration hearing. Compare the sixth amendment standards for determining effective assistance of counsel. *See* 37 OHIO ST. L.J. 927 (1976). Board remedies for breach of the duty of fair representation include cease and desist orders, back pay, orders to process and arbitrate grievances, and orders to furnish and pay for independent counsel. For a summary of existing and potential remedies for a union's breach of its duty of fair representation, see Irving, *Remedies and Compliance—Putting More Teeth Into the Act*, LAB. L. DEV. 349, 404-06 (Southwestern Legal Foundation 1977). *See also* Teamsters Local 282 (Explo, Inc.),

B. *Contractual Union Security Agreements*

In the area of contractual union security agreements, the Board has expressly held that the union has an affirmative obligation to inform unit employees of their obligations under the contract, at least prior to taking adverse action against an employee because of noncompliance with the contract obligations.[139] A requirement of fair dealing owed by a union to employees under union security agreements encompasses the duty to inform the employee of the employee's rights and obligations under such an agreement in order that the employee can take whatever steps might be necessary to protect his job. In *IUE Local 801 v. NLRB*,[140] the Court of Appeals for the District of Columbia upheld the Board's finding that the union's refusal of a valid tender of dues, causing the employer to discharge the employee, violated section 8(b)(2) and (1)(A). The court found that a union has a duty to inform unit employees of their obligations under contractual union security agreements. Echoing the rationale that the Board applies in these cases, the court stated:

> Among the most important of labor standards imposed by the Act as amended is that of fair dealing, which is demanded of unions in their dealings with employees. . . . The requirement of fair dealing between a union and its members is in a sense fiduciary in nature and arises out of two factors. One is the degree of dependence of the individual employee on the union organization; the other, a corollary of the first, is the comprehensive power vested in the union with respect to the individual. . . . The requirement of fair dealing is not limited to union members; when an individual becomes an employee of a company having a union security clause in its contract the new employee is not free to join or refuse to join a union, nor does he have a voice in the selection of his bargaining representative. He takes the existing union and its contract in effect as one of the conditions of his employment. From the beginning of his employment, the union which can require his membership or command his discharge is therefore charged with an obligation of fair dealing which includes the duty to inform the employee of his

229 N.L.R.B. No. 11, 95 L.R.R.M. 1202 (1977); Teamsters Local 186 (United Parcel Serv.), 203 N.L.R.B. 799 (1973), *enforced in part*, 509 F.2d 1075 (9th Cir. 1975); Local 485, IUE (Automotive Plating Corp.), 170 N.L.R.B. 1234 (1968), *enforced in part*, 454 F.2d 17 (2d Cir. 1972); Port Drum Co., 170 N.L.R.B. 555, 556 (1968).

139. *E.g.*, Typographical Union Local 21, 218 N.L.R.B. 812, 824 (1975). The Board has delineated the minimum requirements expected of a union as follows:

> [A]t the very least, before a union may cause a member's discharge from employment because of dues arrearage . . . it must meet this "minimum" obligation by giving reasonable notice of the delinquency, including a statement of the precise amount and months for which dues were owed, as well as an explanation of the method used in computing such amount.

Teamsters Local 122, 203 N.L.R.B. 1041, 1041-42 (1973). *See, e.g.*, Local 3036, Taxi Drivers, 204 N.L.R.B. 427, 428-29 (1973); Local 1908, United Transport (Cottrell Bus Serv.), 199 N.L.R.B. 872, 874 (1972); Allied Maintenance Co., 196 N.L.R.B. 566, 570 (1972); Lodge 946, IAM (Aerojet-General Corp.), 186 N.L.R.B. 561, 562 (1970); Pacific Iron and Metal Co., 175 N.L.R.B. 604 (1969).

140. 307 F.2d 679 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 936 (1962), *enforcing* 129 N.L.R.B. 1379 (1961), 130 N.L.R.B. 1286 (1961).

rights and obligations so that the employee may take all necessary steps to protect his job.[141]

As noted, these cases have arisen in the context of a union's affirmative obligation to inform employees concerning contract union security obligations. The Board's rationale, that the duty of fair representation is essentially a fiduciary one which implies an obligation of full disclosure, however, seems sufficiently broad to apply to a wide variety of situations. Both nondisclosure of contractual requirements as well as misrepresentation regarding contract terms would appear to be within the scope of the duty as defined by the Board.[142]

This expansion of the duty of fair representation readily demonstrates that the Board now sits in review of the quality and adequacy of union representation, and that its standard of review is stringent. Rather than starting with a presumption of fairness and regularity, the Board appears to be placing the burden upon the union to establish the fairness of its procedures or the thoroughness of its representation. The Board has intruded substantially into the internal processes of the union, and the propriety of its entry remains to be validated. If standards such as energetic, diligent, and vigorous representation are to be imposed, it would seem more appropriate that this be done by Congress. It does not appear that Congress has done so,[143] however, in light of the Supreme Court's examination of legislative intent in the cases interpreting section 8(b)(1)(A).

IV. SUPREME COURT INTERPRETATION OF SECTION 8(b)(1)(A).

It is readily apparent that the Board has undertaken an increas-

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141. 307 F.2d at 683. The court relied, *inter alia*, upon Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). The Third Circuit took a similar approach in NLRB v. Hotel Employees' Local 568 (Sheraton Corp.), 320 F.2d 254, 258 (3d Cir. 1963):

> The comprehensive authority vested in the union, as the exclusive agent of the employees, leads inevitably to employee dependence on the labor organization. There necessarily arises out of this dependence a fiduciary duty that the union deal fairly with employees. . . . At the minimum, this duty requires that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure.

See NLRB v. Local 182, Int'l Bhd. of Teamsters, 401 F.2d 509, 510 (2d Cir. 1968), *enforcing* 156 N.L.R.B. 335 (1965), 169 N.L.R.B. 1143 (1963).

142. Stereotypers Local 13 (Denver Post, Inc.), 231 N.L.R.B. No. 96, 96 L.R.R.M. 1073 (1977); United Steelworkers (Duval Corp.), 226 N.L.R.B. No. 118, 94 L.R.R.M. 1239 (1976); Teamsters Local 671 (Airborne Freight Corp.), 199 N.L.R.B. 994, 999-1000 (1972) (failure to inform certain unit employees of the effect of contract proposals, failure to notify certain employees of a meeting to discuss and vote on contract proposals, misrepresentation to employer concerning coverage of contract). The NLRB General Counsel took the position in one case that the *Miranda Fuel* duty of fair representation requires a union to provide requested relevant information in the union's possession to a unit job applicant who had reasonable basis to believe he was being discriminated against in the operation of an exclusive job referral system. NLRB Gen. Counsel Q. Rep., [1975] LAB. REL. YEARBOOK (BNA) 261. *See* Local 324, Operating Eng'rs (Associated Gen. Contractors), 226 N.L.R.B. No. 91, 93 L.R.R.M. 1416 (1976).

143. *See* NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960).

ingly major role in the review and supervision of a union's performance of its representative functions. A number of the problems with *Miranda Fuel* have already been noted, including the question of the applicability of section 8(b)(2) in the absence of unlawful union motivation, and the question of the Board's intrusion into the substantive bargaining area. In addition, it would seem that a substantial question exists concerning whether *Miranda Fuel* is consistent with the Supreme Court's analysis of section 8(b)(1)(A) in the cases discussed in the following section.

A. *Curtis Brothers* and *Allis-Chalmers*

In 1960, in *NLRB v. Drivers Local 639 (Curtis Bros., Inc.)*,[144] the Court rejected the Board's doctrine that peaceful recognitional picketing by a minority union constituted restraint or coercion of employees in violation of section 8(b)(1)(A). In the Board's view, the object of such picketing was to force an employer to recognize a union not chosen by a majority of employees and thereby to deprive employees of their section 7 rights to join or refrain from joining a union. The Board found that inherent in the economic pressure against the employer by the picketing was a threat to employees' job security, and that this threat tainted peaceful picketing as unlawful conduct constituting restraint or coercion within the meaning of section 8(b)(1)(A). The Court, however, held that section 8(b)(1)(A) did not have the broad and general sweep contended by the Board, but rather that this provision was designed to reach only extreme union tactics. Speaking for the Court, Mr. Justice Brennan stated:

> We conclude that the Board's interpretation of § 8(b)(1)(A) finds support neither in the way Congress structured § 8(b) nor in the legislative history of § 8(b)(1)(A). Rather it seems clear, and we hold, . . . that § 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes.[145]

Mr. Justice Brennan stated further that the "note repeatedly sounded" throughout the legislative history of section 8(b)(1)(A) concerned "the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal."[146] He found that the "central theme" throughout the debates was "the elimination

144. 362 U.S. 274 (1960).

145. *Id.* at 290.

146. *Id.* at 286. Mr. Justice Brennan noted that when Senator Ives objected to a proposed amendment to include the words "interfere with" in § 8(b)(1)(A) as too broad, Senator Taft "insisted that even those words would have a limited application and would reach "reprehensible" practices but not methods of peaceful persuasion." *Id.* (citing 93 CONG. REC. 4016-17).

of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal."[147]

Indeed, for many years following the enactment of section 8(b)(1)(A) as part of the 1947 Taft-Hartley amendments the Board had also interpreted the section as being of limited application and directed at means, not ends. In *Perry Norvell Co.*, for example, the Board analyzed section 8(b)(1)(A) as follows:

> Section 8(b)(1)(A) was not intended to have the broad and almost limitless reach which the General Counsel urges upon the Board. The legislative history of the Act shows that, by this particular section, Congress primarily intended to proscribe the *coercive conduct* which sometimes accompanies a strike, but not the strike itself. By Section 8(b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal. In that Section, Congress was aiming at means, not ends.[148]

In *Curtis Brothers* the Court noted that while the Board dismissed such earlier cases "as 'dubious precedent,' " in the Court's view "they gave a sounder construction to § 8(b)(1)(A) than the Board's construction in the present case."[149]

In *NLRB v. Allis-Chalmers Manufacturing Co.*,[150] and in *Scofield v. NLRB*,[151] the Supreme Court has also held that enforcement of a valid union rule by imposition of fines does not violate section 8(b)(1)(A). And in *NLRB v. Boeing Co.*,[152] the Court held that the Board is not to inquire into the reasonableness of a union fine under section 8(b)(1)(A). The problem in the union fine cases has not been with the means encompassed under section 8(b)(1)(A), for fines clearly constitute economic coercion, but with the Court's concern over intrusion into internal union affairs. In *Boeing* the Court noted that "all fines are coercive to a greater or lesser degree" and that:

> The underlying basis for the holdings of *Allis-Chalmers* and *Scofield* was not that reasonable fines were noncoercive under the language of § 8(b)(1)(A) of the Act, but was instead that those provisions were not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act. The reason for this determination, in turn, was that Congress had not intended by enacting this section to regulate the inter-

147. 362 U.S. at 287.

148. 80 N.L.R.B. 225, 239 (1948) (emphasis in original).

149. 362 U.S. at 291. *See* Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 MICH. L. REV. 1435, 1511, 1514-17 (1963).

150. 388 U.S. 175 (1967).

151. 394 U.S. 423 (1969).

152. 412 U.S. 67 (1973).

> nal affairs of unions to the extent that would be required in order to base unfair labor practice charges on the levying of such fines.[153]

Allis-Chalmers and its progeny, and *Curtis Brothers* thus reflect both a limitation on the class of conduct proscribed by section 8(b)(1)(A) as well as a solicitude for internal union processes.

B. *Bernhard-Altman*

Standing like Stonehenge somewhere between the detailed and restrictive analyses of *Curtis Brothers* and *Allis-Chalmers*, however, is the Supreme Court's cursory and vague decision in *Garment Workers v. NLRB (Bernhard-Altmann)*.[154] The Court there held that the employer violated section 8(a)(1) and (2), and that the union violated section 8(b)(1)(A), by entering into an exclusive collective bargaining agreement with a union that represented only a minority of the employees. The Court found that there could be "no clearer abridgment" of the section 7 rights of employees to select their own bargaining representative or to refrain from such activity than to impose a minority union as exclusive representative upon a "nonconsenting majority."[155] It therefore followed "without need of further demonstration" that the employer and the union violated the Act. With regard to section 8(b)(1)(A) the Court, in an opinion written by Mr. Justice Clark, stated summarily:

> In the Taft-Hartley Law, Congress added § 8(b)(1)(A) to the Wagner Act, prohibiting, as the Court of Appeals held, "unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8(a)(1)." 280 F.2d at 620. It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violation of employee rights.[156]

The Court's only reference to *Curtis Brothers* was to note that the court of appeals had distinguished *Curtis Brothers* on the ground that the instant case involved neither organizational nor recognitional picketing.[157]

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153. *Id.* at 73. In NLRB v. Industrial Union of Marine Workers, 318 U.S. 418 (1968), which upheld the Board's finding that a union violated § 8(b)(1)(A) by its expulsion of a member for filing charges with the Board, the Court gave no real explanation why the union's conduct constituted restraint or coercion within the scope of § 8(b)(1)(A). *See generally* Craver, *The* Boeing *Decision: A Blow to Federalism, Individual Rights and Stare Decisis*, 122 U. PA. L. REV. 556 (1974).

154. 366 U.S. 731 (1961). *See* W. GOULD, BLACK WORKERS IN WHITE UNIONS 168 (1977); Leiken, *The Current and Equal Employment Role of the NLRB*, 1971 DUKE L.J. 833, 850-55.

155. 366 U.S. at 737.

156. *Id.* at 737-38.

157. ILGWU v. NLRB, 280 F.2d 616 (D.C. Cir. 1960), *aff'd*, 366 U.S. 731 (1961). The D.C. Circuit's opinion was written by Mr. Justice Burton, sitting by designation, with whom Judge Miller joined to comprise the majority. Mr. Justice Burton stated:

> The instant cases involve much more direct interference and restraint of § 7 rights than did the Curtis Bros. case. In the instant cases the recognition of the minority union is

The Court's pronouncement that section 8(b)(1)(A) has the same scope as section 8(a)(1) would broaden section 8(b)(1)(A) immeasurably, for section 8(a)(1) is not limited to restraint or coercion, much less to violent conduct, duress or reprisals, but covers various forms of generalized and noncoercive interference as well.[158] A closer examination of the substantiation given by the Court for its cryptic conclusion reveals that conclusion to be extremely questionable. The Court in *Bernhard-Altmann* cited, without discussion, four references from the legislative history as support for its summary statement concerning congressional intent in section 8(b)(1)(A).[159] The passages appear to be of dubious support for the proposition tendered by the Court. Indeed, they were given very different interpretations in *Curtis Brothers* and *Allis-Chalmers.*

The Court first cites the supplementary views of five members of the Senate Labor Committee, including Senators Taft and Ball, who believed that the Senate bill did not go sufficiently far in its regulation of union organizational tactics, and who introduced an amendment, analogous to section 8(a)(1), that would have made it an unfair labor practice for a union "to interfere with, or coerce, employees in the exercise of the rights guaranteed in § 7."[160] The words "interfere with" were deleted during debates, and as thus changed the amendment was enacted as section 8(b)(1)(A). As noted above, the Court in *Curtis Brothers* analyzed this same report of supplementary views

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a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative. In the Curtis Bros. case the issue was not whether the recognition of the minority union as the exclusive bargaining representative was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of § 8(b)(1)(A).

Id. at 621. Judge Fahy dissented on the ground that *Curtis Bros.* was dispositive of the case. Judge Fahy stated:

> The subject was exhaustively considered in Curtis. In the absence of an objective explicitly condemned by the Act, such as appears in section 8(b)(4), peaceful economic measures were held not to constitute such restraint or coercion of employees in the exercise of their rights guaranteed by section 7 as to constitute unfair labor practices within the meaning of section 8(b)(1)(A). From this it seems to me to follow that the obtaining of such recognition by peaceful economic measures, unaccompanied by any unlawful contractual provision, is not an unfair labor practice on the part of the union under section 8(b)(1)(A).

Id. at 622-23.

158. *E.g.*, NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964); NLRB v. Exchange Parts Co., 375 U.S. 405 (1964); NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

159. 366 U.S. at 738 n.1. The references pointed to by the Court are: S. REP. No. 105, 80th Cong., 1st Sess. 50 (Supp. Views) (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 456 (1948); 93 CONG. REC. 4432, 4433, 4435 (1947), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1199, 1204, 1207 (1948). The same four references were cited by Mr. Justice Burton in the lower court opinion in support of his conclusion that § 8(b)(1)(A) was intended to be comparable to § 8(a)(1). 280 F.2d 616 at 620-21 n.8, *aff'd*, 366 U.S. 731 (1961).

160. S. REP. No. 105, 80th Cong., 1st Sess. 50 (Supp. Views) (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 456 (1948).

and the amendment and found from them that "similar expressions pervaded the Senate debates on the amendment. The note repeatedly sounded is as to the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal."[161] And the Court in *Allis-Chalmers* analyzed the same statement of views as reflecting that "[t]he mischief against which the Statement inveighed was restraint and coercion by unions in *organizational campaigns*."[162]

The Court's next reference in *Bernhard-Altmann* to the legislative history is a statement by Senator Ball during the debates on the amendment that:

> [I]f, as has been charged on this floor—and I think the charge is true—unions today are using coercive practices in their organization and election drives, then it seems to me individual employees in the free exercise of their rights guaranteed by this act are just as much entitled to protection from such activities of unions as they are from the same kind of coercive activities on the part of employers.[163]

Yet in the same statement Senator Ball goes on to say:

> That modification [the internal union rules proviso] is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees.[164]

The appropriate reading of this language would appear to be that of the Court in *Curtis Brothers*, namely, that Senator Ball's remarks were part of the consistent theme that section 8(b)(1)(A) dealt with union organizational tactics involving violence, duress, or reprisal.[165] The Court in *Allis-Chalmers* found that the passage was one of many wherein Senator Ball made clear that the amendment related to union conduct amounting to restraint and coercion during organizational campaigns.[166]

The Court in *Bernhard-Altmann* next cited a statement by Senator Smith, a co-sponsor of the amendment, that the amendment is designed "to make it balance with exactly the same provision in sec-

161. 362 U.S. at 286.

162. 388 U.S. at 186 (emphasis in original).

163. 93 CONG. REC. 4432 (1947), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1199 (1948).

164. *Id.* at 4433, II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1200 (1948).

165. The Court noted that "Senator Ball cited numerous examples of organizing drives characterized by threats against unorganized workers of violence, job reprisals and such repressive assertions as that double initiation fees would be charged those who delayed joining the union." 362 U.S. at 286.

166. "Senator Ball gave numerous examples of the kind of union conduct the amendment was to cover. Each one related to union conduct during organizational campaigns. Senator Ball reiterated this purpose several times thereafter, including remarks added after the passage of the amendment." 388 U.S. at 186-87.

tion 8(a), which prevents an employer from interfering with [later deleted] or restraining employees in the exercise of their rights."[167] Yet Senator Smith goes on to state that "[t]he pending measure is designed to protect employees in their freedom to decide whether or not they desire to join labor organizations, to prevent them from being restrained or coerced."[168] The Court in *Allis-Chalmers* analyzed Senator Smith's passage as one that "echoed this purpose" of Senator Ball's, which the Court described thus: "The consistent thrust of his arguments was the necessity of controlling union conduct in organizational campaigns."[169]

Finally, in *Bernhard-Altmann*, the Court pointed generally to certain comments of Senator Taft during the debates. At one point in his comments Senator Taft made the statement that "all that is attempted is to apply the same provision [8(a)(1)] with exact equality to labor unions."[170] Elsewhere in the same statement, however, Senator Taft declared:

> The Senator says it will slow up organizational drives. It will slow up organizational drives only if they are accompanied by threats and coercion. The cease-and-desist order will be directed against the use of threats and coercion. It will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employees.[171]

In the same general colloquy Senator Taft gave examples of the kind of employer conduct that he understood had been proscribed by section 8(a)(1). The examples were of threats to discharge, reduce the wage of, or punish employees to prevent their joining a union, as well as threats of violence.[172] Senator Taft then gave as analogous examples of union conduct covered by the amendment, threats of bodily harm and economic coercion, and violent, mass picketing that bars employees from work.[173]

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167. 93 CONG. REC. 4435 (1947), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1204 (1948).

168. *Id.*

169. 388 U.S. at 187-88.

170. 93 CONG. REC. 4436 (1947), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1207 (1948).

171. *Id.*

172. *Id.* at 4435-36, II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1205 (1948).

173. *Id.*, II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1205-06 (1948). Senator Taft also stated:

> The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, "You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it, that is the effect of the amendment.

The Court in *Curtis Brothers* and in *Allis-Chalmers* seems to have squarely rejected the proposition so generally stated in *Bernhard-Altmann* that the reach of section 8(b)(1)(A) is coextensive with that of section 8(a)(1). Thus, in *Curtis Brothers* the Court stated:

> It is true that here and there in the record of the debates there are isolated references to instances of conduct which might suggest a broader reach of the amendment. . . . But they appear more as aside in a debate, the central theme of which was not the curtailment of the right peacefully to strike, except as provided in § 8(b)(4), but the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal.[174]

And in *Allis-Chalmers* the Court stated:

> It is true that there are references in the Senate debate on § 8(b)(1)(A) to an intent to impose the same prohibitions on unions that applied to employers as regards restraint and coercion of employees in their exercise of § 7 rights. However apposite this parallel might be when applied to organizational tactics, it clearly is inapplicable to the relationship of a union member to his own union.[175]

Curtis Brothers seems to have left in its wake a host of unresolved questions concerning the scope and meaning of section 8(b)(1)(A). Included among these is the extent to which section 8(b)(1)(A) is to be limited to a narrow class of repressive conduct. Resolution of these questions is fundamental to the eventual determination of the validity of *Miranda Fuel.*

V. CONCLUSION

National labor policy has been founded on the concept that the collective economic strength of employees acting through their majority representative is the most effective means of promoting collective bargaining. Unions were thereby vested with substantial power to order relations between employer and employee. Indeed, as discussed earlier, it was because of this power that the courts fashioned the duty of fair representation enforceable in the courts.

The judicial doctrine of the duty of fair representation evolved

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Id. at 4436, II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1206 (1948). Senator Taft stated at another point:

> Mr. President, I can see nothing in the pending measure which, as suggested by the Senator from Oregon, would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.

Id., II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1207 (1948). *See also* Senator Taft's remarks, *id.* at 4021, 4023, 4024, II NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1025, 1029, 1030 (1948).

174. 362 U.S. at 286-87.

175. 388 U.S. at 190-91.

as protection for the employee against the improper exercise by a union of its representative role. The doctrine was known when the Taft-Hartley amendments were being considered, yet the legislative history is devoid of any references to the doctrine, much less to any indication that the doctrine was to be incorporated into the unfair labor practice provisions of the Act.[176] When Congress in 1959 determined that employees required additional protection against union excesses, Congress enacted the Landrum-Griffin amendments containing a comprehensive regulation of internal affairs in the area of relations between unions and employees.[177] Thereafter when Congress determined that employees required additional protection against union acts of racial and other invidious discrimination in employment, Congress enacted Title VII of the Civil Rights Act of 1964.[178] The radiations of *Emporium Capwell Co. v. Western Addition Community Organization*[179] suggest that the Board tread carefully in areas covered by Title VII and committed to the Equal Employment Opportunity Commission and the courts.

It is not here suggested as a general principle that federal labor policy endorses the right of a union to freely engage in arbitrary, capricious, or discriminatory conduct of any dimension. Nor is it suggested that the internal union affairs concept under the section 8(b)(1)(A) proviso, the Landrum-Griffin Act, or Title VII encompass or delimit all of the types of conduct now proscribed by the Board under *Miranda Fuel*. What is suggested is that Congress has been both cautious and specific when it has undertaken to regulate union conduct, particularly union-employee relationships, as well as when it has undertaken to regulate racial and other invidious discrimination. There would thus seem to be a substantial and legitimate question concerning the propriety of the Board's conversion of section 8(b)(1)(A) and (2) into the comprehensive code of union regulation herein described. "It may be that the tactics used here deserve condemnation, but this

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176. *See* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 172 (1957).

177. The Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519. The Supreme Court outlined the significance of these amendments as follows:

> The 1959 provisions are significant for still another reason. We have seen that the only indication in the debates over § 8(b)(1)(A) of a reach beyond organizational tactics which restrain or coerce nonmembers was Senator Taft's concern with arbitrary and undemocratic union leadership. The 1959 amendments are addressed to that concern. The kind of regulation of internal union affairs which Senator Taft said protected stockholders of a corporation, and made necessary a "right of protest against arbitrary powers which have been exercised by some of the labor union leaders," is embodied in the 1959 Act. The requirements of adherence to democratic principles, fair procedures and freedom of speech apply to the election of union officials and extend into all aspects of union affairs.

NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. at 194-95. *See generally* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960).

178. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970).

179. 420 U.S. 50 (1975); *see* note 16 *supra*.

would not justify attempting to pour that condemnation into a vessel not designated to hold it."[180] A more specific congressional charter would seem appropriate in this sensitive area.

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180. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 496 (1960). Speaking for the majority in *Insurance Agents'*, Mr. Justice Brennan stated:

> It is one thing to say that the Board has been afforded flexibility to determine, for example, whether an employer's disciplinary action taken against specific workers is permissible or not, or whether a party's conduct at the bargaining table evidences a real desire to come into agreement. The statute in such area clearly poses the problem to the Board for its solution. . . . It is quite another matter, however, to say that the Board has been afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful. Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions. . . . But it is clear to us that the Board needs a more specific charter . . . before it can add to the Act's prohibitions here.

Id. at 498-99.